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No. 12506 2630

United States
Court of Appeals
for the Ninth Circuit.

see vol. — 2631
WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I.
duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO
NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY,
DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY
COMPANY, THE STANDARD REALTY AND DEVELOPMENT
COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE
& CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO
NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY,
DEEP CREEK RAILROAD COMPANY, THE WESTERN
REALTY COMPANY, THE STANDARD REALTY AND DE-
VELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Transcript of Record
In Five Volumes
Volume I
(Pages 1 to 444)

Appeals from the United States District Court,
Northern District of California,
Southern Division.

FILED
JUL 24 1950

No. 12506

**United States
Court of Appeals
for the Ninth Circuit.**

**WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I.
duP. BAYARD, Receiver,**

Appellants,

vs.

**WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO
NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY,
DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY
COMPANY, THE STANDARD REALTY AND DEVELOPMENT
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, for
the Northern District of California, Southern
Division

26508G

In the Matter of

THE WESTERN PACIFIC RAILROAD COM-
PANY, THE WESTERN PACIFIC RAIL-
ROAD CORPORATION,

Plaintiff,

vs.

THE WESTERN PACIFIC RAILROAD COM-
PANY, SACRAMENTO NORTHERN RAIL-
WAY, TIDEWATER SOUTHERN RAIL-
WAY, DEEP CREEK RAILROAD COM-
PANY, THE WESTERN REALTY COM-
PANY, THE STANDARD REALTY AND
DEVELOPMENT COMPANY and DELTA
FINANCE CO., LTD.,

Defendants.

BILL OF COMPLAINT FOR EQUITABLE
RELIEF

The Western Pacific Railroad Corporation, plain-
tiff herein, complaining of the above-named de-
fendants, respectfully shows:

I.

That the plaintiff is a domestic corporation created and existing under the laws of the State of Delaware.

II.

That each of the defendants is a domestic corporation created under the laws of the State of California except that The Western Realty Company and the Deep Creek Railroad Company are respectively domestic corporations of the States of Colorado and Utah.

III.

That this is a civil action in equity between citizens of different states; that the amount in controversy exceeds the sum of \$5,000; and to the extent that it relates to or may affect obligations and liabilities of the Trustees in the proceeding No. 26591-S assumed by the defendant, The Western Pacific Railroad Company, and to the res transferred to it by said Trustees it is an ancillary dependent suit within the jurisdiction reserved by this Court under its Order dated March 28, 1946.

IV.

That during the years 1942 and 1943 and the year 1944 or some part thereof the plaintiff and the defendants were an affiliated group of corporations within the meaning of Section 141 of the Internal Revenue Code and plaintiff on behalf of itself and of the defendants filed Income and Excess Profits Tax Returns on a consolidated basis

as the result of which there may be tax liabilities asserted or tax refunds recognized or inter-corporate adjustments required, the amount of which cannot be determined and equitably charged against or credited to one or more of the members of the affiliated group without an accounting and a judicial determination of their rights and liabilities inter sese and without the intervention of a Court of Equity. That for the year 1942 a Return was filed showing tax liabilities for the affiliated group which were paid by the then Trustees of the Estate of The Western Pacific Railroad Company out of funds in their custody derived from trusteeship operations that for the year 1943 and part of the year 1944 Consolidated Income Tax Returns were filed by the plaintiff for itself and its affiliates which reported a deductible loss by the plaintiff in an amount sufficient to eliminate all taxable income for the group as a whole for 1943 and to provide unused credit balances to carry back to 1942 and carry forward to 1944 sufficient to eliminate taxable income for the affiliated group for the period to which such Returns relate, and that in 1945 the plaintiff for itself and its affiliates as their rights may appear filed with the Collector of Customs in the City and State of New York a claim for a refund of the taxes paid by the Trustees of the estate of The Western Pacific Railroad Company for 1942—said claim being in the amount of \$4,201,821.54.

V.

That there is no statutory rule or regulation for the apportionment of tax liabilities or tax benefits among members of an affiliated group of corporations within the scope of said Section 141 of the Internal Revenue Code and their rights and liabilities inter sese growing out of what is done by one member on behalf of all rest upon the established principles of equity and are only cognizable in a Court of Equity which through its flexible action of accounting may render its decree in favor of any one or more of the parties and against any one or more of the other parties and may apportion among the parties any fund or funds in respect of which one or more parties may interplead.

VI.

That by the terms of the Revenue Code and the Regulations of the Treasury thereunder the fund of \$4,201,821.54 in respect of which the plaintiff has filed a refund claim on behalf of itself and the other members of the affiliated group as their interests may appear is payable to the plaintiff and the plaintiff itself claims to be the beneficial owner of the claim but to the end that the ownership of the fund and any rights of other members of the group thereagainst may be judicially determined the plaintiff hereby brings said fund together with any deductions therefrom or accretions thereto into the Court and interpleads against the other members of the group in respect thereof in order that the right of

all members of the affiliated group therein may be fixed and determined.

VII.

That by reason of the Returns filed by the plaintiff on behalf of itself and other members of the affiliated group and the deductible losses shown thereby or reflected therein certain tax benefits have accrued in respect of which reserves have been set up by one or more members of the affiliated group in amounts aggregating approximately \$10,100,000 which belong to the members of the affiliated group as their rights may appear, and the plaintiff itself claims to be the beneficial owner of said reserves but to the end that the ownership of the said reserves and any rights of members of the group thereagainst may be judicially determined the plaintiff brings this proceeding to place said reserve fund in judicial custody or subject to the jurisdiction and supervisory power of this Court in order that the rights of all members of the affiliated group therein may be fixed and determined.

For as much, therefore, and the plaintiff and the defendants are remediless at law for the determination of their rights inter sese and the respective interest of each thereof, if any, in the several funds referred to in this Bill of Complaint and can obtain appropriate relief in a Court of Equity where matters of account as well as matters of equitable adjustment are peculiarly cognizable, the plaintiff files this Bill of Complaint and prays equitable relief as follows:

1. That this Court place in judicial custody all moneys in or coming into the hands of the parties to this proceeding representing refund claims or reserves in respect of taxes paid or withheld from payment under or in respect of Federal Income taxes and Excess Profits taxes, either or both for the years 1942, 1943 and 1944 or any part thereof.

2. That the respective rights and interests of the plaintiff and the defendants and each thereof in and to said funds be fixed and determined or in lieu thereof or in addition thereto that the beneficial interest of the plaintiff and the defendants in any tax saving resulting from the contribution of income by one or more members of the affiliated group to which they belong and the contribution of offsetting deductible losses by one or more other members of the same group be fixed and determined by this Court in accordance with the principles of equity and good conscience.

3. That an account be stated in accordance with respective rights and interests of the plaintiff and the defendants in and to said funds and tax savings showing the amounts due each in respect thereof.

4. That a decree be rendered conforming to such stated account and directing that the plaintiff and the defendants recover the amounts shown to be due them thereunder.

5. That the parties hereto be enjoined and restrained from disbursing any funds in or coming into their custody or possession and constituting

the refunds and reserves referred to in this Bill of Complaint except upon the Order of this Court.

6. That the plaintiff have such other and further relief by way of declaratory decree or judgment or otherwise as it may be advised and to the Court shall seem meet.

Dated: Oct. 10, 1946.

THE WESTERN PACIFIC
RAILROAD CORPORATION,

By /s/ LeROY R. GOODRICH,
Its Attorney.

/s/ FRANK C. NICODEMUS, JR.,

/s/ A. PERRY OSBORNE,
Of Counsel.

[Endorsed]: Filed Oct. 10, 1946.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM OF DEFENDANTS THE WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY COMPANY, DELTA FINANCE CO., LTD., AND STANDARD REALTY AND DEVELOPMENT COMPANY

Come now defendants The Western Pacific Railroad Company, Sacramento Northern Railway,

Tidewater Southern Railway Company (sued herein as Tidewater Southern Railway), Delta Finance Co., Ltd., and Standard Realty and Development Company, and answering the complaint of plaintiff herein and by way of counter claim, admit, deny and allege as follows:

I.

Admit paragraphs I and II of the complaint, except the allegation that Deep Creek Railroad Company is a domestic corporation, and allege in that respect that Deep Creek Railroad Company was formerly a Utah corporation, and that all of its stock was owned at all times herein mentioned by defendant The Western Pacific Railroad Company, and that said Deep Creek Railroad Company was in process of liquidation in the years 1942, 1943 and 1944 and was finally dissolved in the year 1944.

II.

Answering paragraph III of the complaint, admit that this is a civil action between citizens of different states and that the amount in controversy exceeds the sum of \$5,000 exclusive of interest and costs; deny all the averments contained in paragraph III of the complaint except those hereinbefore expressly admitted.

III.

Answering paragraph IV of the complaint, admit, deny and allege as follows: During the years 1942 and 1943 and the first four calendar months of the year 1944, the plaintiff and the defendants, including

the defendant Deep Creek Railroad Company, which was in the process of liquidation in the years 1943 and 1944, were an affiliated group of corporations within the meaning of the Internal Revenue Code. Plaintiff was at all said times the parent corporation of said group and filed income and excess profits tax returns on a consolidated basis for said group for the said years 1942 and 1943. In the year 1945 plaintiff filed an income and excess profits tax return for the year 1944 and included in said return the income of the other members of said affiliated group for the first four months of 1944. The said consolidated return for the year 1942 reported income and excess profits tax payable by the affiliated group in the sum of \$4,201,821.54, and the aforesaid returns for the years 1943 and 1944 reported no taxable income. On March 9, 1945, the plaintiff filed with the Federal Collector of Internal Revenue in the Second District of New York a claim for refund of the sum of \$4,201,821.54 theretofore paid as income and excess profits taxes for 1942, together with the interest thereon. The whole of said last mentioned amount of tax was paid in 1943 by plaintiff with funds supplied to plaintiff for that purpose by the Reorganization Trustees of defendant The Western Pacific Railroad Company. Thereafter and in the year 1943 certain of the defendants herein paid or credited to said Reorganization Trustees their respective portions of said tax, so that the net amounts of said tax borne and paid by the parties to this suit were as follows:

14 *Western Pacific R.R. Corp., et al., vs.*

Plaintiff	\$	00.00
Defendant The Western Pacific Railroad Company.....		4,144,828.87
Defendant Sacramento Northern Railway.....		2,847.58
Defendant Tidewater Southern Railway Company.....		53,608.94
Defendant The Western Realty Company.....		00.00
Defendant Deep Creek Railroad Co.....		00.00
Defendant Standard Realty and Develoment Company.....		00.00
Defendant Delta Finance Co., Ltd.....		536.15
<hr/>		
Total	\$	4,201,821.54

The defendant The Western Pacific Railroad Company is entitled to the whole of said sum when refund thereof is made, together with all interest thereon, and to the whole amount refunded, and will upon receipt of said refund credit or pay to the defendants Sacramento Northern Railway, Tidewater Southern Railway Company, and Delta Finance Co., Ltd., their respective proportions thereof, and said three last named defendants will look to defendant The Western Pacific Railroad Company for such credit or payment. None of the parties to the above-entitled cause, other than the defendant The Western Pacific Railroad Company and said last named three defendants, paid or contributed

any sum or thing of value to the payment of said tax or any part thereof, and none of said parties other than the defendant The Western Pacific Railroad Company has any right, title, interest or claim, at law or in equity, in or to said refund claim or the amount refundable thereunder or any part thereof. Under and by virtue of the Internal Revenue Code and the regulations thereunder providing for and relating to consolidated returns for affiliated corporations, the tax liability of said affiliated group for Federal income and excess profits taxes was required to be, and was, determined upon the basis of the taxable net income of the said group as a unit. Provision for the allocation to the respective members of such group of their proportion of the tax so determined to be payable was lawful and proper, and the whole of said tax for 1942 was allocated to the defendant The Western Pacific Railroad Company and the three other defendants aforesaid, as above set forth, but no right, title, interest or claim was created or arose, or could be created or arise, on the part of any member of said affiliated group against any other member thereof, by virtue of said consolidated returns or any thereof, or by virtue of the individual deductible losses or taxable gains of such members, or otherwise, for any sum in excess of the portion of the tax actually paid or payable by the member making such claim. In the year 1943 plaintiff and other members of said group incurred deductible losses in the total amount sufficient to eliminate all taxable income for the affli-

ated group for 1943 and to provide unused credit balances to carry back to 1942 and carry forward to 1944 sufficient to establish no taxable income for the years 1942 and 1944, and in said federal tax returns for 1943 and 1944 plaintiff reported said losses and said carry-back and carry-forward portions thereof, and the aforesaid claim for refund of the 1942 taxes referred to the said carry-back. The major portion of the aforesaid deductible losses incurred in the year 1943 was the loss of plaintiff arising from the fact that the stock of the defendant The Western Pacific Railroad Company held by plaintiff became worthless in said year. In and by reporting said loss in said returns for 1943 and 1944, and in and by referring to same in filing said claim for refund, plaintiff suffered no detriment, loss, cost or expense and furnished no legal or equitable consideration or contribution to the members of the affiliated group or to any of them. These answering defendants deny all the averments contained in paragraph IV of the complaint except those hereinabove expressly admitted.

IV.

Deny the averments contained in paragraph V of the complaint.

V.

Answering paragraph VI of the complaint, admit, deny and allege as follows: By the terms of the Internal Revenue Code and the regulations thereunder, the amount refundable under said refund claim is payable by the United States to the plaintiff

as collecting agent for the member of said group, namely, defendant The Western Pacific Railroad Company, which originally provided the moneys for payment of the tax. Said claim was filed and is made for the use and benefit of said defendant as the member of said affiliated group which provided the moneys for payment of the entire tax for the group. The other defendants which contributed to the payment of said tax, namely, Sacramento Northern Railway, Tidewater Southern Railway Company, and Delta Finance Co., Ltd., will look to defendant The Western Pacific Railroad Company for credit or payment of their proportions of said refund. Plaintiff is not entitled beneficially to the refund of the same or any part thereof or any interest thereon. Neither said claim for refund nor the moneys that are refundable thereunder constitute or are a fund of said affiliated group, or a fund in respect whereof the members of said group may interplead or be interpleaded, but on the contrary said claim is the exclusive right and property of defendant The Western Pacific Railroad Company and said defendant is entitled to the whole sum refundable thereunder.

VI.

Answering paragraph VII of the complaint, admit, deny and allege as follows: Defendant The Western Pacific Railroad Company has a reserve fund for contingent tax liabilities in the sum \$10,-100,000, invested in United States Government Securities, for the purpose of discharging the liability

of said defendant for such federal income and excess profits taxes, if any, as may be imposed upon said defendant for the years 1943 and 1944. Neither the plaintiff nor any member of said affiliated group other than the defendant The Western Pacific Railroad Company furnished or contributed any money or other thing of value to said fund. Said fund and the securities comprising the same are the exclusive property of the defendant The Western Pacific Railroad Company and the said fund is held by said defendant to provide for the payment of its own taxes, if any are payable by it, and not for the benefit, advantage, use or behoof of plaintiff or any other member of said group. Neither said fund nor any part thereof is a fund of said affiliated group, or a fund in respect whereof the members of said group may interplead or be interpleaded, and neither plaintiff nor any member of said affiliated group other than the defendant The Western Pacific Railroad Company has any right, title, interest or claim in or to said fund, or in or to any part thereof, at law or in equity. Deny all the averments contained in paragraph VII of the complaint except those hereinbefore expressly admitted.

VII.

It was plaintiff's duty under the Internal Revenue Code and regulations to make and file income and excess profits tax returns for the years 1942, 1943 and 1944. In and by making and filing said income and excess profits tax returns for the years 1942, and 1943 and 1944 plaintiff performed its said duty

in accordance with the requirements of the Code and regulations. Plaintiff as a separate corporation had no income or excess profits tax liability on either a separate or consolidated basis for 1942, 1943 and 1944 and paid no tax for any of said years. In and by filing said returns plaintiff furnished no consideration or contribution whatsoever to other members of said affiliated group, or any of them, and suffered no detriment, loss, cost or expense for itself or for said members or any of them, in that its action in filing said returns was performed under a duty imposed by law.

VIII.

In and by filing the said returns for the years 1942, 1943 and 1944, and in and by filing said refund claims, plaintiff acted as the agent and representative of the affiliated group to file such returns and claim for refund, but plaintiff did not therein or thereby gain or acquire any right or claim as against any other member of said group to be paid any sum or sums or receive anything of value for or on account of filing said returns or claim, or for or on account of theoretical taxes not paid or payable by said group or any member thereof, and on the contrary the exaction or receipt by plaintiff from the members of said group or any thereof, of any sum or other thing of value, for or on account of so-called tax savings, to wit, moneys not paid or payable as taxes, by any other member or members of said group, resulting from the filing of consolidated returns, would have been and was and is

inequitable, unjust, and unconscionable, and the claims made by plaintiff in this cause to payment or other compensation for or on account of such tax savings, were and are inequitable, unjust, and unconscionable, in that the plaintiff was an agent and fiduciary for the members of said affiliated group in making said returns, and may not lawfully or equitably use or avail of its said agency to obtain or secure a profit or advantage for itself at the expense of other members of said group for whom it was such agent.

IX.

In and by filing the said returns and filing said refund claim, plaintiff acted as the agent and representative designated by the Internal Revenue Code and the regulations thereunder relating to consolidated returns for affiliated groups, but plaintiff did not therein or thereby gain or acquire any right or claim as against any other member or members of said group to be paid any sum or sums or receive anything of value for or on account of filing said returns or claim, or for or on account of taxes not paid or payable by said group or any member thereof, and on the contrary the exaction or receipt by plaintiff from the members of said group or any thereof, of any sum or other thing of value, for or on account of such filing or said taxes not paid or payable, would have been and was and is illegal, unjust and inequitable, and contrary to the intent and purposes of the Internal Revenue Code and the regulations thereunder, and plaintiff's claims in this

cause are illegal, unjust and inequitable, and contrary to the intent and purposes of the Code and said regulations, in that such exaction or receipt and the claims made by plaintiff in this cause would constitute and be a purchase and sale of deductible tax losses, or exaction of compensation therefor, and a sale of the privilege of filing consolidated returns, contrary to the intent and purpose of the said statutes, and the regulations thereunder.

X.

At the time plaintiff filed said consolidated returns for the year 1943, to wit, July 15, 1944, wherein plaintiff reported its said large deductible loss of 1943, plaintiff had an interest in the said affiliated group, in that plaintiff was then entitled, under certain contingencies, to regain the ownership of all the stock of the defendant, The Western Pacific Railroad Company, and plaintiff's act and decision in filing the same was done and taken for the advantage and benefit of plaintiff in that plaintiff's said contingent interest in the stock of said defendant gave to plaintiff an interest in the effect upon the tax liability of said defendant of filing said consolidated returns. In and by reporting said deductible loss in said consolidated return, plaintiff elected to, and became bound to, apply the carry-back portion thereof to the year 1942, and to file a refund claim on account of such carry-back and the aforesaid refund claim was thereafter filed by plaintiff in pursuance of its said election and obligation so to do.

XI.

Ever since the year 1918 and until April 30, 1944, plaintiff was the parent corporation of and controlled the members of an affiliated group of corporations and determined whether or not consolidated returns should be filed for said group, including itself, and therein and thereby exercised for itself and said group and in the common interests of the members of the group and the interest of the plaintiff as the sole owner of the ultimate equity in the group the statutory privilege extended by the applicable provisions of The Revenue Acts and Section 141 of the Internal Revenue Code of filing or not filing consolidated returns and elected continuously in favor of consolidated returns and therein and thereby plaintiff elected for itself and the other members of said group and from time to time committed the group for future years to file such consolidated returns. The defendants The Western Pacific Railroad Company and Deep Creek Railroad Company were members of said affiliated group at all of said times and the other defendants herein were members of said group at various times. In and by its said control and elections from time to time plaintiff derived many advantages and benefits in the manner and to the extent intended by the said statutes and regulations, including, among others, the future consequences of such elections, as well as the results and effects in the years of filing the returns, and the various members of said group, including plaintiff, had variously individual incomes and deductible losses

taken up in said consolidated returns from year to year. At all said times plaintiff controlled the allocation of the taxes as between the members of said group, and continuously and consistently allocated the group tax for each year between the members of said group, including itself, who had individual taxable incomes in such year, in the proportions that their individual incomes bore to the total of such incomes, ignoring losses of other members of the group, but plaintiff never charged itself nor claimed credit for itself or charged or claimed credit for any member of said group for or on account of theoretical taxes not payable by the group in consequence of deductible losses suffered or incurred by one or more of its members in years when other members had taxable gains. Plaintiff never made any claim of that nature against or in favor of any member of the group until the making of the claims stated in its complaint herein, which said claims were not made until long after the said affiliation had been severed and were made at a time when plaintiff had no ownership of or interest in said group or any member thereof. Plaintiff and all other members of said group became bound by, and agreed to, the said long continued custom and practice of allocating between the members of said group the actual group tax, and no more, and therein and thereby plaintiff waived and relinquished whatsoever right it might otherwise have had to claim as against any member of said group, any other or further allocation, adjustment or claim arising out of the filing of such consolidated returns

or the individual taxable gains and deductible losses of the members of said group. By reason of said custom, practice and agreement and by reason of the advantages and benefits received by plaintiff from the said exercise of its privilege of filing consolidated returns for said group for all said years, plaintiff's claims in this suit are unjust, inequitable and unconscionable.

XII.

At all times mentioned herein to and including April 30, 1944, plaintiff was the owner and holder of all of the capital stock of defendant The Western Pacific Railroad Company. From August 2, 1935, to December 29, 1944, defendant The Western Pacific Railroad Company was a railroad corporation in reorganization under the provisions of Section 77 of the Bankruptcy Act, in that certain proceeding in the United States District Court for the Northern District of California, Southern Division, entitled "In the Matter of The Western Pacific Railroad Company," No. 26591 S in the files of said Court, and the title to and possession of all of its properties were at all times from September 23, 1935, to December 29, 1944, held by T. M. Schumacher and Sidney M. Ehrman, as the Reorganization Trustees appointed by said court. Said defendant The Western Pacific Railroad Company was reorganized in said proceeding under a Plan of Reorganization filed by the Interstate Commerce Commission June 21, 1939, which said Plan of Reorganization was finally confirmed by said Court by

its order in said proceeding made October 11, 1943. In and by said Plan of Reorganization as finally confirmed October 11, 1943, it was determined that the stock of said defendant held by plaintiff herein, being all of the preferred and common capital stock of said defendant, was without equity or value. Under and pursuant to said Plan of Reorganization and the order of said Court in said proceeding made November 27, 1944, and at 12:01 a.m., on December 29, 1944, said Trustees returned and transferred to the said reorganized corporation, defendant The Western Pacific Railroad Company, all the business, assets and property, of every kind and description held by said Trustees in said bankruptcy proceeding, free and clear of all claims other than such claims as were preserved under the said Plan of Reorganization and were not limited or discharged by the orders of said Court. A copy of said Order of November 27, 1944, is hereunto annexed, marked Exhibit 1.

XIII.

In and by its claims against the defendant The Western Pacific Railroad Company and against and in respect of the said reserve and the said refund claim belonging to the defendant The Western Pacific Railroad Company, plaintiff seeks to establish and enforce liens senior to the liens of those claimants in said reorganization proceeding whose liens were found to have equity and value and were preserved and provided for in the said Plan of Reorganization, and plaintiff seeks thereby to gain

a preference over such claimants. The entire business, assets and properties of said reorganized company were returned and transferred to it by said Trustees pursuant to said Plan and the orders of said Court, subject only to the claims so preserved. In and by said Plan of Reorganization all claims junior to the claims of First Mortgage Bondholders and General and Refunding Mortgage Bondholders of said defendant The Western Pacific Railroad Company were found and determined to be without equity or value, and the claims of said bondholders were preserved, and were paid and discharged under said Plan in common stock, and other securities, of the said reorganized company, so that the said bondholders became the owners of the entire common stock of the reorganized company. Plaintiff's aforesaid claims in this cause and each of them are unjust, inequitable and unconscionable in this, that the aforesaid deductible loss incurred by plaintiff, and the filing of said federal tax returns and refund claim reporting said loss, furnish no just or equitable ground or reason for giving or granting to plaintiff a preference over said prior claimants, to wit, said bondholders, as to all or any part of said reserve fund or said refund claim or any other assets or property of said reorganized company, but said claims of plaintiff cannot now be recognized or allowed in any manner or to any extent without thereby granting such inequitable preference.

XIV.

Each and all the claims of plaintiff in and to said reserve fund, or any portion thereof, and in and to said refund claim, or the amount refundable thereunder, are unjust, inequitable, and unconscionable in all the respects hereinafter in this paragraph XIV averred or mentioned. Said claims and each of them arose and could have been presented to the said Bankruptcy Court more than two years before the commencement of this action. Plaintiff was a party to said reorganization proceeding and had personal notice of all of the proceedings in the Bankruptcy Court and before the Interstate Commerce Commission in respect of the business, assets and properties of the defendant The Western Pacific Railroad Company and the Plan of Reorganization thereof, and stood by and wholly failed and neglected to present said claims, or any thereof, to the said Court or to said Commission or to the said Reorganization Trustees or to the defendant The Western Pacific Railroad Company, and wholly failed to notify the said Court, Commission, Trustees or defendant company thereof prior to the effectuation and consummation of said Plan of Reorganization, and permitted the said Plan to be effectuated and consummated without presenting or giving notice of said claims to said Court, Commission, Trustees or defendant company so that said Plan of Reorganization was effectuated and consummated by said Trustees pursuant to said Plan and the orders of said Court and Commission, and all parties in interest under said Plan accepted

and received the new securities and the other provisions made for them under said Plan, without notice of plaintiff's said claims, or any thereof. Plaintiff further stood by and wholly failed and neglected to present its said claims, or any thereof, to the said Court, Trustees and defendant company, or any thereof, and wholly failed to notify them or any of them of such claims or any thereof, prior to the final settlement of the accounts of said Trustees by said Court, and prior to the termination of said reorganization proceedings, and permitted said accounts to be settled and said proceedings to be terminated without giving notice of said claims or any thereof, or presenting the same or any thereof, and all parties in interest participated in the said proceedings, and said accounts were settled and allowed, and said proceedings were terminated, without any party to said proceedings having notice of said claims or any thereof. In and by the neglect and conduct of plaintiff aforesaid plaintiff was guilty of laches and the said claims and each and all thereof became and are stale and inequitable, and barred by the said laches and inequitable conduct and neglect of plaintiff. These defendants refer to the averments of paragraphs I to XIII of this answer in connection with and as stating further grounds for their defense that plaintiff's claims are stale and barred by plaintiff's laches.

XV.

The rights of action set forth in the complaint in respect of, or pertaining to, that portion of the

reserve fund created by said court order, to wit, \$7,100,000 did not accrue within two years next before the commencement of this action. The rights of action set forth in the complaint in respect of the remainder of said reserve fund, to wit, \$3,000,000 and in respect of the said refund claim, to wit, the claim for refund of \$4,201,821.54 taxes paid for the year 1942, did not accrue within two years next before the commencement of this action.

XVI.

Said Bankruptcy Court on March 28, 1946, made its Final Order in said reorganization proceeding terminating said proceeding, subject only to the reservations of jurisdiction made and referred to in said order, and in and by said order said Court permanently restrained and enjoined all persons from instituting, prosecuting or pursuing claims against said defendant The Western Pacific Railroad Company, or against any of the assets or property of said defendant, on account of any right, claim or interest which such person might have had in, to or against said defendant, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of said Court). A copy of said Final Order is hereunto annexed, marked Exhibit 2. In and by said Final Order plaintiff was and is forever restrained and enjoined from instituting or prosecuting this cause as against the defendant The Western Pacific Railroad Company and from instituting or prosecuting any action or

proceeding to establish or enforce the claims and each thereof against said defendant which are set forth in its complaint herein.

XVII.

In and by said Plan of Reorganization and the said Orders of said Court, Exhibits 1 and 2 to this answer, and each of them, plaintiff was and is forever barred and foreclosed from claiming as against the defendant The Western Pacific Railroad Company all or any part of the aforesaid claim for refund of taxes paid by said Trustees in the sum of \$4,201,821.54, and forever barred and foreclosed from claiming all or any part of the said refund, when made; and the whole sum payable upon said refund claim, including interest thereon, became and was and is the property and asset of defendant The Western Pacific Railroad Company, free and clear of all claims and demands of plaintiff.

XVIII.

In and by said Plan of Reorganization and the said Orders of said Court, Exhibits 1 and 2 to this answer, and each of them, plaintiff and all parties to this action other than defendant The Western Pacific Railroad Company were and are forever barred and foreclosed from claiming all or any part of said reserve fund of \$10,100,000 and forever barred and foreclosed from claiming against said defendant any sum or contribution whatsoever, on account of the so-called tax savings, to wit, the non-existence of taxable net income, reported by the

said returns filed for the years 1943 and 1944, and the entire business, assets and property returned and transferred by said Reorganization Trustees to said defendant were in and by said Plan and Orders returned and transferred to said defendant free and clear of all such claims of plaintiff and the other members of said affiliated group or any of them. In and by said Orders of said Court and the said Plan of Reorganization and each of them, each and every, all and singular, the claims of plaintiff in this cause against the defendant The Western Pacific Railroad Company were and are forever barred and foreclosed.

XIX.

Said Bankruptcy Court on March 3, 1944, made its order authorizing and directing the said Trustees to establish a reserve fund for contingent tax liabilities in the amount of \$7,100,000, for the sole and exclusive purpose of providing for the payment of federal income and excess profits taxes for the year 1943 in the event the same should become payable by said Trustees or by the reorganized company, defendant The Western Pacific Railroad Company. A copy of said Order is hereto annexed marked Exhibit 3. In and by said Order, said reserve fund became and was, and is, a fund belonging exclusively to the reorganized company, defendant The Western Pacific Railroad Company, and may not be subjected to the claims of the other members of the said affiliated group or any of them. Said

reserve fund created by said Court order is a part of the reserve fund of \$10,100,000 mentioned in plaintiff's complaint. The remainder of said reserve fund, to wit, \$3,000,000, was created by resolution of the Board of Directors of the reorganized company The Western Pacific Railroad Company adopted March 26, 1945, for increasing said reserve fund held for said purposes, exclusively, to the sum of \$10,100,000. Neither plaintiff, nor any other member of the affiliated group, other than defendant, The Western Pacific Railroad Company, has ever contributed anything to said reserve fund and neither plaintiff nor any of the said other members of said group have any right, title, interest or claim in or to said reserve fund, or in or to any portion thereof at law or in equity.

XX.

Plaintiff's complaint fails to state a claim upon which relief can be granted to plaintiff against defendants or any of them.

Counterclaim

For a counterclaim of the answering defendants herein, said defendants aver as follows:

I.

Defendants refer to and by such reference incorporate in this counterclaim all and singular the averments, admissions and denials in their foregoing answer.

II.

Defendant, The Western Pacific Railroad Company, is the owner of said fund and said refund claim and is entitled to the moneys refundable under said claim, and plaintiff has no right, title, or interest, at law or in equity, in or to said fund or the said refund claim or the taxes refundable thereunder.

III.

A controversy exists between plaintiff on the one part, and these defendants on the other part, regarding the rights of the parties arising out of, or in respect to, the said reserve fund and refund claim, and regarding the rights and obligations of the plaintiff and the defendants as members of the aforesaid affiliated group to pay or contribute or receive inter sese any sum or sums of money or other thing of value on account of federal income and excess profits taxes not paid or payable by said parties for the years 1942 and 1943 and 1944, or any portion thereof. Plaintiff contends that certain sums are payable by members of said group and are receivable by other members of said group on account of such taxes not paid or payable, in consequence of the fact that losses of some members and gains of other members were included in determining that there was no such tax liability for said years, and these defendants contend on the contrary that no rights or obligations to receive or pay any sum or sums arose or were created as between the members of said group by reason of such

taxes not being paid or payable, either in consequence of such gains or losses of members of the group, or otherwise.

IV.

All the parties necessary to the determination of said controversy are parties to the above-entitled cause.

V.

Plaintiff threatens to, and will, unless restrained and enjoined by this Honorable Court, collect and receive for itself, and apply to its own use and benefit, the sums to be refunded under said refund claim, to the great and irreparable loss of the defendant, The Western Pacific Railroad Company.

Wherefore, defendants pray for the order, judgment, and decree of this Honorable Court:

1. Forever restraining and enjoining plaintiff from receiving for itself, or applying to its own use or benefit, all or any part of the moneys refundable under said claim for refund.

2. Ordering and directing plaintiff by the mandatory order and injunction of this Court to endorse and deliver to the defendant, The Western Pacific Railroad Company, each and all checks, drafts or other commercial or Treasury paper received by plaintiff representing said refund or any part thereof.

3. Declaring and determining that defendant, The Western Pacific Railroad Company, is the sole

owner of and is exclusively entitled to said reserve fund and said refund claim and all sums refundable thereunder, and quieting the right and title of said defendant therein and thereto against the claims of plaintiff and all other parties to this cause, and restraining and enjoining plaintiff and all other parties to this suit other than defendant, The Western Pacific Railroad Company, from instituting or prosecuting claims thereto.

4. Declaring and determining that plaintiff has no rights or claims against these answering defendants or any of them for on or account of any matter or thing averred in plaintiff's complaint herein.

5. For defendants' costs of suit herein, and all such other and further relief as may be meet and equitable in the premises.

Dated: December 3, 1946.

THE WESTERN PACIFIC RAILROAD CO.,
SACRAMENTO NORTHERN RAILWAY,
TIDEWATER SOUTHERN RAILWAY CO.,
DELTA FINANCE CO., LTD.,
STANDARD REALTY AND DEVELOPMENT
CO.,

By /s/ ALLAN P. MATTHEW,
JAMES D. ADAMS,
ROBERT L. LIPMAN,
BURNHAM ENERSEN,
Their Attorneys.

Receipts of copy acknowledged.

EXHIBIT 1

Original Filed Nov. 27, 1944, with Clerk, U. S.
Dist. Court, San Francisco.

Pillsbury, Madison & Sutro,
Standard Oil Building,
San Francisco, California.

Whitman, Ransom, Coulson & Goetz,
40 Wall Street,
New York 5, N. Y.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 26591-S

In the Matter of:

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER DIRECTING THE REVESTING OF
PROPERTIES OF THE DEBTOR IN THE
DEBTOR COMPANY, FIXING THE DATE
FOR CONSUMMATION OF THE PLAN
AND AUTHORIZING AND DIRECTING
THE CARRYING OUT OF THE PLAN

The petition filed November 8, 1944, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorganization

of the debtor above named, for an order directing the revesting of properties of the debtor in the debtor company, fixing the date for consummation of the plan, approving forms of deeds and agreements and authorizing and directing the carrying out of the plan of reorganization, came on duly to be heard on November 27, 1944, and was heard and has been submitted.

The Court being fully advised in the premises, finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court dated and filed November 8, 1944, and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) Pursuant to the order of this Court entered September 25, 1944, approving the proposed Certificate of Amendment to the Articles of Incorporation and proposed amended By-Laws for the debtor company, the stockholders and Board of Directors of The Western Pacific Railroad Company have approved and adopted said Certificate of Amendment and said amended By-Laws and have authorized the necessary filing of said Certificate of Amendment; and upon such filing of said Certificate of Amendment, The Western Pacific Railroad Company will be a proper corporate instrumentality for putting into effect and carrying out the plan of reorganization:

(b) The stockholders of The Western Pacific Railroad Company have consented in writing to the execution and delivery of the Indenture relat-

ing to the First Mortgage Bonds and the creation by The Western Pacific Railroad Company of the bonded indebtedness as provided therein, and have consented in writing to the execution and delivery of the Indenture relating to the General Mortgage Income Bonds and the creation by The Western Pacific Railroad Company of the bonded indebtedness as provided therein and have authorized the assumption by said Railroad Company of certain obligations of the debtor company and its estate as contemplated by the plan of reorganization and have authorized the Board of Directors to issue shares of preferred and common stock, subject to the provisions of said Articles of Incorporation as so amended, and have authorized and directed the Board of Directors to do all other acts and things that may be necessary or appropriate in carrying out and making effective said plan of reorganization;

(c) The Board of Directors of The Western Pacific Railroad Company has approved the form of Indenture relating to the First Mortgage Bonds contemplated by the plan, the form of Indenture relating to the General Mortgage Income Bonds contemplated by the plan, the form of Scrip Agreement relating to the issuance of scrip in respect of fractional General Mortgage 4½% Income Bonds, Series A, shares of Preferred Stock, Series A, and shares of common stock; has approved the bond, scrip and other forms included in said Indentures and Scrip Agreement, and the forms of

certificates for shares of Preferred Stock, Series A, and shares of common stock, and determined the manner of executing the same; has approved mortgaging and pledging the properties and franchises of said Railroad Company, as contemplated in the Indentures mentioned above; has authorized and directed the execution and acknowledgment, and delivery, on or before the date fixed by the Court for the consummation of the plan of reorganization, of said Indentures and the necessary filing and recording thereof, the issue on said date of \$10,000,000 aggregate principal amount of First Mortgage 4% Bonds, Series A, \$21,219,000 aggregate principal amount of General Mortgage 4½% Income Bonds, Series A, 318,502 shares of the authorized Preferred Stock, Series A, not more than 319,032.767 shares of the common stock and the required scrip certificates, and the assumption of obligations by said Railroad Company, all as contemplated by said plan of reorganization and authorized and directed by the orders of the Court herein;

(d) The proposed deed from the debtor's Trustees to The Western Pacific Railroad Company, the proposed deed of release and satisfaction of mortgage from Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the debtor's First Mortgage dated June 26, 1916, and the proposed deed of release and satisfaction of mortgage from Irving Trust Company, as Trustee under the debtor's General and Refunding Mortgage, executed February 29, 1932, as of

January 1, 1932 (annexed to this order as Exhibits "A," "B" and "C," respectively), are in proper form and sufficient when properly executed, acknowledged and delivered, to release, transfer to and revest in said Railroad Company all right, title and interest of the debtor's Trustees and of said Trustees under the debtor's said mortgages, in and to all of the business, assets and property dealt with by the plan of reorganization, free from any title or lien of the debtor's Trustees and said mortgages, are consistent with and conform to the provisions of the plan of reorganization, are necessary and appropriate to the putting into effect and carrying out the plan, and should be approved;

(e) The proposed agreement, attached to this order as "Exhibit D," provides for the assumption of obligations, liabilities, contracts, agreements and leases which are to be assumed by the reorganized company, pursuant to the plan of reorganization, is consistent with and conforms to the plan of reorganization, and should be approved;

(f) The Interstate Commerce Commission, by its order dated October 24, 1944, in Finance Docket #10913, has authorized the revesting in The Western Pacific Railroad Company of the business, assets and property constituting the estate of the debtor and the issue of securities and the assumption of obligations by The Western Pacific Railroad Company to the extent contemplated by the plan of reorganization and by this order; said order of the Commission also approves and authorizes the adjustment or compromise of the claims of the

Reconstruction Finance Corporation against the debtor and its estate, pursuant to the applicable provisions of the Reconstruction Finance Corporation Act and said plan; said order of the Commission authorizes the issue of said securities as subject to Section 77(f) of the Bankruptcy Act, Section 20a of the Interstate Commerce Act and the applicable provisions of the Reconstruction Finance Corporation Act; said securities and the issue thereof are specifically exempt from the provisions of the Securities Act of 1933, under the terms of Section 3(a)(6) of said act and subsection (f) of Section 77 of the Bankruptcy Act and are specifically exempt from the provisions of the Trust Indenture Act of 1939, under the terms of Section 304(a)(4) of said act, and said action by the Commission satisfies the statutory requirements for such issue and no other or further authorization of any other governmental commission, agency or body, federal or state, is necessary or required;

(g) The issuance, transfer and exchange of the securities and the making, delivery and filing of the instruments of transfer or conveyance issued, transferred, exchanged, made, delivered or filed, pursuant to the plan of reorganization, the order of the Commission referred to in subparagraph (f) above, or this order, are to make effective a plan of reorganization confirmed under the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed:

1. The form and provisions of each of the following instruments are hereby approved:

(a) the deed from the debtor's Trustees to The Western Pacific Railroad Company, attached to this order as "Exhibit A";

(b) the deed of release and satisfaction of mortgage from Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the debtor's First Mortgage, to The Western Pacific Railroad Company, attached to this order as "Exhibit B";

(c) the deed of release and satisfaction of mortgage from Irving Trust Company, as Trustee under the debtor's General and Refunding Mortgage, to The Western Pacific Railroad Company, attached to this order as "Exhibit C."

2. The arrangements made by the Reorganization Committee with Guaranty Trust Company of New York for the services of said Company as depositary and exchange agent and the proposed letter of instructions to said Company relating to the deposit and exchange of securities (submitted at the hearing upon said petition and attached to this order as Exhibit "F"), are approved.

3. The Western Pacific Railroad Company is hereby authorized and directed to file or cause to be filed, on or before December 28, 1944, the Cer-

tificate of Amendment to its Articles of Incorporation, heretofore approved by order of this Court entered September 25, 1944, with the Secretary of State of California and, in due course, to file copies thereof, as may be required by law, with the Secretaries of State of Nevada and Utah and in the several counties of the States of California, Nevada and Utah in which the railroad and properties of the debtor are located.

4. T. M. Schumacher and Sidney M. Ehrman, Trustees herein, are hereby authorized and directed to execute, acknowledge and deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed, substantially in the form attached to this order as "Exhibit A" and approved herein, releasing and transferring to The Western Pacific Railroad Company, as of 12:01 a.m., Pacific War Time, on December 29, 1944, title to all property, rights and interests of every kind and description held by them as such Trustees, and are further authorized and directed thereafter to execute, acknowledge and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper to release, convey, assign or transfer to said Railroad Company, their entire right, title and interest in and to all of the business, assets and property of said Railroad Company.

5. Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under

the First Mortgage dated June 26, 1916, executed by the debtor to First Federal Trust Company and Henry E. Cooper, Trustees (Crocker First National Bank of San Francisco and Samuel Armstrong, successor Trustees), are hereby authorized and directed to execute, acknowledge and deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed releasing and satisfying, as of 12:01 a.m., Pacific War Time, on December 29, 1944, said First Mortgage of the debtor and all instruments supplemental or amendatory thereto, substantially in the form attached to this order as "Exhibit B" and approved herein, to transfer, convey and deliver to said Railroad Company, all moneys, credits, securities, evidences of indebtedness, choses in action, shares of stock, and all other property, rights and interest of every kind and description held by them as Trustees under said Mortgage and instruments supplemental or amendatory thereto, and to execute and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper for these purposes.

6. Irving Trust Company of New York, as Trustee under the debtor's General and Refunding Mortgage executed February 29, 1932, as of January 1, 1932, by the debtor to The Chase National Bank of the City of New York, Trustee (Irving Trust Company, successor Trustee), is hereby authorized and directed to execute, acknowledge and

deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed releasing and satisfying, as of 12:01 a.m., Pacific War Time, on December 29, 1944, said General and Refunding Mortgage of the debtor and all instruments supplemental or amendatory thereto, substantially in the form attached to this order as "Exhibit C" and approved herein, to transfer, convey and deliver to said Railroad Company all moneys, credits, securities, evidences of indebtedness, choses in action, shares of stock, and all other property, rights and interests of every kind and description held by it as Trustee under said Mortgage and instruments supplemental or amendatory thereto, and to execute and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper for these purposes.

7. Whether executed before or after the date of consummation of the plan of reorganization, each of the deeds of release and satisfaction made pursuant to paragraphs "5" and "6" of this order by the trustees of the mortgages mentioned in said paragraphs, shall be effective as of the date of consummation of said plan and as of that date, each of said trustees shall be discharged and relieved of all obligations, liabilities, responsibilities and duties with respect to the particular mortgage or deed of trust and all indentures supplemental thereto, under which such trustee is acting.

8. The Western Pacific Railroad Company and

its proper officers are hereby authorized and directed to execute and deliver each and every of the following agreements and indentures, on or before December 28, 1944, as requested by the Reorganization Committee:

(a) agreement providing for the assumption of certain obligations, liabilities, contracts, agreements and leases of the debtor and the debtor's Trustees, substantially in the form attached to this order as "Exhibit D," the form and provisions of which are hereby approved;

(b) the Indenture relating to the First Mortgage Bonds, referred to in said petition, in the form submitted to this Court upon the hearing on said petition, which Indenture is found to be substantially in the form approved by order of this Court entered September 25, 1944; said Indenture to be deemed effective at 12:01 a.m., Pacific War Time, on December 29, 1944, coincident with the effective date of the deed from debtor's Trustees and the releases from existing mortgage trustees as provided in paragraphs "4," "5" and "6" of this order;

(c) the Indenture relating to the General Mortgage Income Bonds, referred to in said petition, in the form submitted to this Court upon the hearing of said petition, which Indenture is found to be substantially in the form approved by order of this Court entered September 25, 1944; said Indenture to be deemed effective at 12:01 a.m., Pacific War Time, on December 29, 1944, coincident with the effective date of the deed from debtor's Trustees

and the releases from existing mortgage trustees as provided in paragraphs "4," "5" and "6" of this order, but immediately following and subject to the taking effect of the Indenture referred to in subdivision (b) of this paragraph 8;

(d) the Scrip Agreement referred to in said petition, substantially in the form submitted to this Court upon the hearing of said petition, which Agreement is found to be substantially in the form approved by order of this Court entered October 23, 1944;

(e) the salary agreement substantially in the form attached to this order as "Exhibit E," the form and provisions of which are hereby approved.

9. The Western Pacific Railroad Company shall assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by the debtor's Trustees and remaining in effect on the date of the actual delivery of possession by said Trustees and the actual termination of the responsibility of the debtor's Trustees for the operation of the debtor's properties, as hereinafter provided in this order, and which have heretofore been assumed or not disaffirmed by said Trustees, which remain in effect on December 31, 1944, together with the expenses of this reorganization as allowed by the Court within the maximum fixed by the Interstate Commerce Commission. Without limitation of the generality of the duties imposed on The Western Pacific Railroad Company as above provided, it shall specifically assume and

agree to perform the obligations of the Trustees in respect of the following:

(a) \$1,235,000 unpaid balance, principal amount of Three Per Cent. Equipment Trust Certificates, Series of 1937, issued February 1, 1937, under Agreement of same date, between J. T. Harrigan and F. E. Egly, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(b) \$1,855,000 unpaid balance, principal amount of One and Three-Quarters Per Cent Equipment Trust Certificates, Series of 1941, issued August 1, 1941, under Agreement of same date, between M. J. Suydam and F. W. Walter, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(c) Conditional Sale Agreement, dated as of May 25, 1943, between Lima Locomotive Works, Incorporated, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six steam freight locomotives.

(d) Conditional Sale Agreement, dated as of June 21, 1943, between Electro-Motive Division, General Motors Corporation and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property

of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of three 5400 H.P. diesel electric freight locomotives.

(e) Conditional Sale Agreement, dated as of June 1, 1944, between The Chase National Bank of the City of New York and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six 5400 H.P. diesel electric freight locomotives.

And, further, without limitation of the generality of the obligations hereinabove imposed upon The Western Pacific Railroad Company, that company shall (a) specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment, being the coupons which this Court by orders of March 11, 1936, and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor, and (b) assume liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in said proceeding and without prejudice by reason of such proof not having been made. The above ordered assumption and adoption shall be evidenced by the execution by

said Railroad Company of the agreement of assumption referred to in paragraph "8(a)" above and of such other instruments of assumption as may be appropriate; and said Railroad Company shall succeed to all rights, privileges, liabilities and duties of the debtor or the debtor's Trustees under such contracts, leases and agreements; provided, however, that this order shall not be construed as a modification of any former orders of this Court barring or settling claims against the debtor or the debtor's Trustees, and said Railroad Company shall assume only the valid and outstanding obligations and liabilities of the debtor or the debtor's Trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged, and only such obligations and liabilities as are preserved under the plan of reorganization and are not limited or discharged by the prior orders of this Court.

10. The Western Pacific Railroad Company shall pay, in such amounts as have heretofore been, or shall hereafter be determined by this Court, but only to the extent that the same shall not have been paid by the debtor's Trustees, all expenses and costs of administration of this proceeding, including, without limiting the generality of the foregoing, all allowances of compensation for services heretofore or hereafter rendered and reimbursement of expenses heretofore or hereafter incurred in connection with this reorganization proceeding or

the plan of reorganization, subsequent to October 31, 1939; provided, however, that said Railroad Company is authorized to pay, in its discretion, without further order of this Court and regardless of amount, all rentals, costs and expenses growing out of the joint use of the property of other carriers, and all taxes, and all other obligations (not including any such allowances of compensation for services or reimbursement of expenses) incurred subsequent to August 2, 1935, by the debtor or the debtor's Trustees in the ordinary course of business in the operation of the aforesaid business, assets or property, pursuant to the general authorizations granted by this Court.

11. The date for the consummation of the plan of reorganization, and the date upon which the first mortgage bondholders and secured creditors of the debtor shall be entitled to receive in exchange for their old securities, the new securities and adjustment payments under the plan, as heretofore approved and authorized by this Court, is hereby fixed as December 29, 1944; all of the business, assets and property constituting the debtor's estate, of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees herein, shall vest in and be and become the absolute property of The Western Pacific Railroad Company on said date, free and clear of all rights, claims, liens and interests of said Trustees, the former stockholders and creditors of the debtor, and

of all other persons, firms and corporations whatsoever, except as is otherwise provided in this order, and the said Railroad Company shall thereupon be forever released and discharged from all of its debts, obligations and liabilities, except as herein provided; and The Western Pacific Railroad Company shall, on said date

(a) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to holders of the debtor's existing first mortgage bonds, or upon their order, upon presentation and surrender of such bonds, together with all interest coupons due after September 1, 1933 (upon which surrender said first mortgage bonds and interest coupons shall be cancelled), said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including the authorized scrip for fractional interests), and the adjustment payments heretofore ordered by this Court (for each \$1,000 principal amount of existing first mortgage bonds so surrendered, \$400 principal amount of General Mortgage 4½% Income Bonds, Series A; \$600 face amount of Preferred Stock, Series A, 4.67 shares of common stock, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944);

(b) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, to holders of scrip certificates

for the debtor's existing first mortgage bonds in the aggregate principal amount of \$300, or upon their order, upon surrender of said certificates in lots of \$100 principal amount or any multiple thereof, said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court upon the same basis as such securities are issuable to holders of the debtor's existing first mortgage bonds, as provided in subparagraph (a), of this paragraph 11.

(c) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, to the holder or holders of ten of the debtor's existing first mortgage bonds, namely, Nos. M3595, M3596, M21612, M21613, M21614, M21615, M21616, M21618, M21619 and M21620, or upon their order, upon presentation and surrender of such bonds with coupons maturing on and after September 1, 1935, attached, notwithstanding the provisions of subparagraph (a), of this paragraph 11, only said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court, as follows for each said bond, \$400 principal amount of General Mortgage 4½% Income Bonds, Series A, \$600 par value of Preferred Stock, Series A, 3.356 shares of common stock and the adjustment

payments as provided in the order of this Court dated September 25, 1944; and execute, issue and deliver or cause to be made available for delivery through said depository and exchange agent to The Western Pacific Railroad Corporation, or upon its order, in respect of coupons numbered 36 and 37 formerly attached to each of said bonds, upon presentation and surrender of such coupons, said Railroad Company's common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court, as follows: for each said coupon, .437 shares of common stock and the adjustment payment as provided in the order of this Court dated September 25, 1944.

(d) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to Reconstruction Finance Corporation, \$10,000,000 principal amount of said Railroad Company's First Mortgage 4% Bonds, Series A, bearing interest from January 1, 1945, \$1,185,200 principal amount of its General Mortgage 4½% Income Bonds, Series A, \$1,777,800 par value of its Preferred Stock, Series A, 15,788 shares of its common stock, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944; and Reconstruction Finance Corporation shall, on such date, surrender and pay over to said Railroad Company, all out-

standing Trustees' certificates of indebtedness heretofore at any time issued by the debtor's Trustees to Reconstruction Finance Corporation, \$6,000,000 of cash collateral heretofore deposited with Reconstruction Finance Corporation by the debtor's Trustees as security for said Trustees' certificates, all notes and other evidences of indebtedness of the debtor held by Reconstruction Finance Corporation, all bonds and other obligations of the debtor held by Reconstruction Finance Corporation as collateral security for said indebtedness, and all other collateral pledged by the debtor as security for the notes held by Reconstruction Finance Corporation; and Reconstruction Finance Corporation shall, on such date, pay over to said Railroad Company the further sum of \$1,075,000 in cash, less such sum as may be required for the payment of interest upon said Trustees' certificates to December 29, 1944, and the payment of an amount equal to interest on said \$10,000,000 of First Mortgage 4% Bonds from said date to January 1, 1945;

(e) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to The Railroad Credit Corporation, or upon its order, \$154,080 principal amount of said Railroad Company's General Mortgage 4½% Income Bonds, Series A, \$241,640 par value of its Preferred Stock, Series A, not more than 35,425 shares of common stock (including the authorized Scrip for fractional interests) and \$72.00 in cash,

and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944, upon surrender by The Railroad Credit Corporation of all notes and other evidences of indebtedness of the debtor held by The Railroad Credit Corporation and of all bonds and other obligations of the debtor held by The Railroad Credit Corporation as collateral security for said indebtedness and all other collateral pledged by the debtor as security for the notes held by The Railroad Credit Corporation (other than the pledge of the distributive shares of the Railroad Company and its subsidiaries under the the marshalling and distributing plan of 1931); provided, however, that of the maximum amount of common stock so authorized to be issued to The Railroad Credit Corporation, only so much shall be issued as is within the limitation fixed by the order of this Court made September 14, 1944, providing for the reduction of such common stock on account of sums applied by The Railroad Credit Corporation under the marshalling and distributing plan in reduction of its claims, but in the event that said order of September 14, 1944, shall be modified or reversed upon appeal so as to entitle The Railroad Credit Corporation to receive additional common stock within the maximum limit hereinabove stated, then The Western Pacific Railroad Company shall execute, issue and deliver such additional common stock without further order of this Court and without further consideration other

than the surrender by The Railroad Credit Corporation at the time of the consummation of the plan of its secured notes of the debtor and the collateral thereto to the extent and in the manner hereinabove provided;

(f) execute, issue and deliver, or cause to be made available for delivery through said depository and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to A. C. James Co., or upon its order, \$163,680 principal amount of said Railroad Company's General Mortgage 4½% Income Bonds, Series A, (including the authorized Scrip for fractional interests) \$256,700 par value of its Preferred Stock, Series A, 37,635 shares of its common stock and \$100.00 in cash, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944, upon surrender of all notes and other evidences of indebtedness of the debtor to A. C. James Co., all bonds and other obligations of the debtor held as collateral security for said indebtedness, and all other collateral pledged by the debtor as security for the notes to A. C. James Co.

12. Notwithstanding the provisions of the foregoing paragraphs "4" and "11" of this order, the debtor's Trustees are authorized and directed to continue their control and operation of the debtor's business and properties until 12:00 o'clock midnight, Pacific War Time, on December 31, 1944, and until such time, to retain possession of so much of the funds and properties of the debtor as

may be necessary for the purposes of such control and operation; provided, however, that all right and duty of such Trustees to possess, control or operate said business and properties shall cease at 12:00 o'clock midnight, on December 31, 1944.

13. Any lien which may attach to the property subjected to the lien of the mortgages to be executed and delivered by The Western Pacific Railroad Company pursuant to subparagraphs (b) and (c) of Paragraph 8 of this order, during the period between the execution and delivery thereof and the completion of the recording of said mortgages, shall be subordinate to the lien of such mortgages, unless any such lien so attaching would be prior to the lien of such mortgages if the same had been recorded; and this Court reserves jurisdiction over the business, assets, franchises and property to be vested in The Western Pacific Railroad Company as provided herein, and of any claims to liens which may be asserted against the same, to the extent necessary to give effect to the provisions of this paragraph.

14. Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, as the Reorganization Committee, are hereby authorized and directed to prepare a notice to the holders of first mortgage bonds and secured notes of the debtor, in such form as the Reorganization Committee shall determine, notifying such creditors that they are entitled to present the obligations of the debtor now held by them

to the Guaranty Trust Company of New York, the depositary and exchange agent designated by the Court, and to receive, on and after December 29, 1944, for such obligations, the new securities and adjustment payments to which they are entitled under the plan; said Reorganization Committee shall publish said notice twice a week for two successive weeks prior to December 29, 1944, in one daily newspaper of general circulation in the City of San Francisco, California, and in one daily newspaper of general circulation in the City of New York, New York. Said Reorganization Committee shall also mail a copy of said notice at least ten days prior to December 29, 1944, to each of the first mortgage bondholders and secured creditors of the debtor so far as the post office addresses of such security holders are available to the Reorganization Committee.

15. Until the further order of this Court, and except as the creation of liens is specifically provided for or permitted by this Court, all persons, firms or corporations, whatsoever or wheresoever situated, located or domiciled, are hereby restrained or enjoined from interfering with, attaching, garnishing, levying upon, granting or enforcing liens against or upon, or in any manner whatsoever disturbing any part of the assets, goods, moneys, railroad, properties and premises belong to or in the possession of said Railroad Company on and after the time specified in paragraph "11" hereof, by reason of or growing out of any obligation or obli-

gations heretofore incurred by the debtor or the debtor's Trustees herein.

16. The Reorganization Committee and The Western Pacific Railroad Company shall have full power and authority to and shall put into effect and carry out the reorganization plan and the orders of this Court, including this order, relative thereto, the laws of any state or the decision or order of any state authority to the contrary notwithstanding.

17. For the purpose of the determination and application of the available net income of the reorganized company for the calendar year 1944, pursuant to subdivision "L" of the plan of reorganization, and for the determination of amounts payable as interest on the General Mortgage 4½% Income Bonds, Series A, of the reorganized company out of available net income for the calendar year 1944, and for the determination of earnings for the calendar year 1944, available for determination and payment by the directors of dividends upon the preferred and common stocks of the reorganized company, the operation by the debtor's Trustees of the properties and estate of the debtor during the calendar year 1944, shall be deemed to be for the account of the reorganized company; and the directors of the reorganized company are expressly authorized and directed to proceed with the determination of the available net income for the calendar year 1944, and the application of such

available net income in the same manner as if such operation had actually been carried on in the calendar year 1944 by the reorganized company.

18. T. M. Schumacher and Sidney M. Ehrman, Trustees herein, shall render their final account to this Court on or before May 1, 1945, and The Western Pacific Railroad Company shall pay from time to time their compensation and expenses, including compensation and disbursements of counsel acting for said trustees, as heretofore fixed by order of this Court until such date.

19. This order and all transactions pursuant hereto shall be without prejudice to any rights or claims of right of Reconstruction Finance Corporation and The Railroad Credit Corporation in and to any collateral pledged by persons other than the debtor as security for the notes of the debtor held by Reconstruction Finance Corporation and The Railroad Credit Corporation respectively, and without prejudice to any right or claim of right of The Railroad Credit Corporation under the terms of the plan of reorganization to retain distribution credits under the marshalling and refunding plan accruing to the debtor and its subsidiaries subsequent to the consummation of the plan of reorganization.

20. This Court reserves jurisdiction for all purposes necessary to put into effect and carry out this order and the plan of reorganization, including, without limiting the generality of this reservation, the right to enter, upon such notice as this Court

may direct, any further order or orders terminating the right to receive any securities or payments of cash under the plan of reorganization; and this Court expressly reserves jurisdiction to determine all costs and expenses of administration, including the amounts to be paid as compensation for services heretofore or hereafter rendered or reimbursement for expenses heretofore or hereafter incurred by the Reorganization Committee and its attorneys, or by any other person, firm or corporation, in connection with this proceeding and the plan of reorganization, and generally in connection with putting into effect and carrying out the plan of reorganization.

Dated: Nov. 27, 1944.

A. F. ST. SURE,
District Judge.

EXHIBIT "A"

Trustees' Deed

Know All Men by These Presents, that the Grantors T. M. Schumacher and Sidney M. Ehrman, as Trustees of the property of The Western Pacific Railroad Company, a railroad corporation organized and existing under the laws of the State of California (said corporation being referred to herein as the "Railroad Company"), being in possession of and operating the property of the Railroad Company, including its property in the States of California, Nevada and Utah, under the juris-

diction of the United States District Court, for the Northern District of California, Southern Division, for and in consideration of and in compliance with the orders and directions of the said Court in the reorganization proceedings mentioned below, have remised, released, transferred, conveyed and quit-claimed, and by these presents do remise, release, transfer, convey and quitclaim unto the Grantee, The Western Pacific Railroad Company, the said Railroad Company (the reorganized corporation under the Plan of Reorganization hereinafter mentioned), its successors, grantees and assigns, all of the property, real, personal and mixed, of every kind and nature of the said Railroad Company now vested in, held, possessed, used or controlled by said T. M. Schumacher and Sidney M. Ehrman, as such Trustees, and, without in anywise limiting the generality or all-inclusive scope of the foregoing description, including the following:

All of the lines of railroad heretofore owned or operated by the said Railroad Company and now vested in, held, possessed used or controlled by the Grantors, together with all of the estates, rights, powers, privileges, franchises, immunities and all other property used in connection therewith or in any way pertaining thereto.

All of the Railroad Company's estate, right, title, interest, terms and remainders of terms, franchises, privileges and rights of action of whatsoever name and nature in law or in equity in any and all track-age, terminal or operating contracts or agreements or

leases, and all extensions or renewals thereof, used or usable in connection with the aforesaid lines of railroad or appertaining thereto; all rights of way, station grounds, railroad yards, terminal grounds, and other lands, tenements and hereditaments of whatever kind or description; also all main, branch, cut-off, spur, industrial, switch, connecting, storage, yard or terminal tracks, easements estates, superstructures, roadbeds, bridges, trestles, culverts, viaducts, buildings, depots, stations, office buildings, stock yards, warehouses, elevators, car houses, engine houses, freight houses, machine shops and other shops, turntables, fuel stations, water stations, signals, interlocking plants, telegraph and telephone lines, fences, docks, structures, improvements and fixtures; and all mechanical equipment, machinery, tools, implements, furniture, supplies, materials, and other chattels, all locomotives and engines however propelled or operated, passenger, freight or other railway cars, derricks and other work equipment or cars, buses, trucks, automobiles and other automotive machines, and any and all other rolling stock and vehicles; and all other property of every kind and nature, in anywise or at any time, owned or used or useful in connection with the operation of the aforesaid lines of railroad or the carrying on of the business and affairs of the Railroad Company either by the Railroad Company or by the Grantors, as such Trustees, and now forming a part of the property and estate of the Railroad Company now held by the Grantors as such Trustees;

together with all of the rights, powers, privileges, franchises, immunities, and other property of whatsoever kind so vested, held, possessed, used or controlled either in connection with the operation of the aforesaid lines of railroad or otherwise, including all choses in action and all interests of the Grantors, as such Trustees, in all suits and proceedings wheresoever brought and by whomsoever instituted now pending or which may hereafter be commenced prior to the final discharge of the Grantors as such Trustees.

This conveyance is made by the Grantors pursuant to a Plan of Reorganization of The Western Pacific Railroad Company, confirmed by order of the District Court of the United States for the Northern District of California, Southern Division, in proceedings for the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, entitled "In the Matter of The Western Pacific Railroad Company, Debtor, No. 26591-S," and in connection with and for the purpose of consummating a Plan of Reorganization in said proceedings, and pursuant to the direction, designation and authorization of the Court contained in the order entered, 1944, in said reorganization proceedings.

And said Grantors hereby agree that they will, on the request of The Western Pacific Railroad Company and at its expense, execute, acknowledge and deliver all and every such further instruments as may be necessary or proper to confirm and fur-

ther evidence the release, transfer and conveyance of the aforesaid property.

This instrument is executed by and shall be binding upon the Grantors as Trustees of the property of said Railroad Company for the uses and purposes above set forth and referred to, and shall be effective as of 12:01 a.m. Pacific War Time, December 29, 1944; provided, however, that the Grantors shall retain possession of so much of the property and assets hereby conveyed as may be necessary or convenient to enable the Grantors as directed by said order of, 1944, in the reorganization proceedings, to continue, as Trustees, to carry on and operate the railroad business of the Railroad Company until midnight December 31, 1944, at which time all right of the Grantors to retain possession or control of said property and assets shall cease and terminate.

In Testimony Whereof, the Grantors as such Trustees have executed this instrument this day of December, 1944.

.....[L. S.]
.....[L. S.]

As Trustees of the Property
of The Western Pacific
Railroad Company.

In the presence of:
.....

[Appropriate acknowledgments to be supplied]

EXHIBIT "B"

Satisfaction of Mortgage

Whereas, The Western Pacific Railroad Company, a corporation organized and existing under the laws of the State of California, executed and delivered a Mortgage or Deed of Trust dated June 26, 1916, to First Federal Trust Company and Henry E. Cooper, as Trustees, to secure an issue of First Mortgage bonds of The Western Pacific Railroad Company, limited to the aggregate principal amount of \$50,000,000 at any one time outstanding:

Whereas, according to the records of the undersigned, said Mortgage or Deed of Trust was recorded:

on July 17, 1916, in Liber 451 of Mortgages (new series) page 1, in the office of the County Recorder of the City and County of San Francisco, State of California,

on July 17, 1916, in Liber 1124 of Mortgages, page 67, records of Alameda County, California,

on July 17, 1916, in Book B, Volume 125 of Mortgages, pages 245, San Joaquin County Records, California,

on July 17, 1916, in Book 177 of Mortgages, page 163, Sacramento County Records, California,

on July 17, 1916, in Book 35 of Mortgages, page 100, Sutter County Records, California,

on July 17, 1916, in Volume 31 of Mortgages, page 97, Yuba County Records, California,
on July 17, 1916, in Book 80, page 1 of Mortgages, Butte County Records, California,
on July 17, 1916, in Volume 15 of Mortgages, page 395, Plumas County Records, California,
on July 17, 1916, in Book O of Mortgages, page 15 et seq., Lassen County Records, California,
on July 17, 1916, in Book 26 of Mortgages, page 293, Records of Washoe County, Nevada,
on July 18, 1916, in Book K, page 46 of Mortgages and in Book F, page 9 of Chattel Mortgages, Records of Humboldt County, Nevada,
on July 24, 1916, in Book 6 of Mortgages, page 721, and in Book 3, page 1, of Chattel Mortgages, Records of Lander County, Nevada,
on July 18, 1916, in Liber E of Mortgages, page 346, and in Liber B of chattel Mortgages, page 3, Records of Eureka County, Nevada,
on July 17, 1916, in Book 8 of Real Mortgages, page 201, and in Book 6 of Chattel Mortgages, page 290, Records of Elko County, Nevada,
on July 18, 1916, in Book J of Mortgages, page 141, Tooele County, Utah,
on July 18, 1916, in Book 7-Q of Mortgages, page 85, County of Salt Lake Records, Utah,
on July 19, 1916, in Book 5 of Mortgages, page 324, County of Box Elder Records, Utah,

on July 18, 1916, as a Chattel Mortgage, in Tooele County Records, Utah,

on July 18, 1916, as a Chattel Mortgage in Salt Lake County Records, Utah,

on July 19, 1916, as a Chattel Mortgage in Box Elder County Records, Utah,

on December 7, 1916, in Liber M of Mortgages, page 177, Records of Sierra County, California,

on November 13, 1917, in Volume 226 of Mortgages, page 383, Records of Santa Clara County, California,

on July 17, 1916, in Book 9 of Chattel Mortgages, page 1, Records of Washoe County, Nevada.

Whereas, Crocker First National Bank of San Francisco, a corporation organized and existing under the laws of the United States, and Samuel Armstrong, are now the Trustees under said Mortgage or Deed of Trust, Crocker First National Bank of San Francisco having become successor corporate Trustee on May 31, 1934, and Samuel Armstrong having become successor individual Trustee on January 28, 1935;

Whereas, the District Court of the United States for the Northern District of California, Southern Division, in proceedings for reorganization of The Western Pacific Railroad Company under Section 77 of the Bankruptcy Act, as amended, entitled "In

the Matter of The Western Pacific Railroad Company, Debtor," Docket No. 26591-S, by order entered October 11, 1943, confirmed a Plan of Reorganization of The Western Pacific Railroad Company, which Plan provides, among other things, for the issuance of new securities to the holders of bonds under said Mortgage or Deed of Trust in payment and satisfaction of their bonds, and the release and cancellation of mortgages on the property of The Western Pacific Railroad Company; and

Whereas, by order entered in said proceedings on, 1944, said Court directed said Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under said Mortgage or deed of Trust to execute and deliver to The Western Pacific Railroad Company, a satisfaction and release of said Mortgage or Deed of Trust;

Now, Therefore, in consideration of the premises, Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under said Mortgage or Deed of Trust, pursuant to said order dated, 1944, hereby certify that, effective December 29, 1944, at 12:01 a.m., Pacific War Time, said Mortgage or Deed of Trust, has been satisfied and discharged and do hereby cancel and discharge said Mortgage or Deed of Trust and consent and direct that said Mortgage or Deed of Trust be discharged of record in the states and counties in which the same has been recorded, and do hereby release, remise, quitclaim, transfer, re-

convey and reassign to The Western Pacific Railroad Company, all of the property, both real and personal, mortgaged, conveyed or pledged by said Mortgage or Deed of Trust and now held by said Trustees thereunder;

And said Crocker First National Bank of San Francisco and Samuel Armstrong as Trustees, as aforesaid, hereby agree that they will, on the request of The Western Pacific Railroad Company and at its expense, execute, acknowledge and deliver all and every such further instruments as may be necessary or proper to cancel and discharge said Mortgage or Deed of Trust, and to have the same satisfied of record.

In Witness Whereof, Crocker First National Bank of San Francisco, as such successor Trustee, by its officers hereunto duly authorized, has executed the foregoing instrument and caused its corporate seal to be hereunto affixed, and Samuel Armstrong as successor Trustee has hereunto set his hand and seal, this day of December, 1944.

CROCKER FIRST NATIONAL
BANK OF SAN FRANCISCO,
as Successor Trustee.

By.....

Vice President.

Attest:

.....

.....

As Successor Trustee.

[Appropriate acknowledgments to be supplied.]

EXHIBIT "C"

Satisfaction of Mortgage

Whereas, The Western Pacific Railroad Company, a corporation organized and existing under the laws of the State of California, executed and delivered a Mortgage or Deed of Trust dated as of January 1, 1932, to The Chase National Bank of The City of New York, as Trustee, to secure an issue of General and Refunding Mortgage Bonds of The Western Pacific Railroad Company, limited to an aggregate principal amount of \$100,000,000 at any one time outstanding;

Whereas, according to the records of the undersigned, said Mortgage or Deed of Trust was recorded:

on March 12, 1932, in Volume 2353, page 17 of the official records of the City and County of San Francisco, California,

on March 12, 1932, in Volume 25, page 80 of the official records of Sutter County, California,

on March 12, 1932, in Volume 22, page 225 of Mortgages in the County of Plumas, California,

on March 14, 1932, in Volume Z, page 211 of Mortgages in the County of Lassen, California,

on March 14, 1932, in Volume 12, page 375 of the official records of Yuba County, California,

on March 14, 1932, in Volume 4, page 423 of the official records of Modoc, California,

on March 15, 1932, in Volume 2792, page 101 of the official records of Alameda County, California,

on March 15, 1932, in Volume 319, page 1 of the official records of Sacramento County, California,

on March 15, 1932, in Volume 387, page 393 of the official records of San Joaquin, California,

on March 15, 1932, in Volume 604, page 365 of the official records of the County of Santa Clara, California,

on March 15, 1932, in Volume P, page 227 of Mortgages in the County of Sierra, California,

on March 15, 1932, in Volume 37, page 175 of the official records of Siskiyou County, California,

on March 17, 1932, in Volume 85, page 57 of the official records of Butte County, California,

on March 12, 1932, in Volume 1, page 277 of Chattel Mortgages in the County of Lander, Nevada,

on March 12, 1932, in Volume 2, pages 413-471 of Mortgages in the County of Elko, Nevada,

on March 12, 1932, in Volume A, page 238 of Mortgages in the County of Eureka, Nevada,

on March 12, 1932, in Volume 1, page 415 of Mortgages in the County of Pershing, Nevada,

on March 12, 1932, in Volume 56, page 250 of Mortgages in the County of Washoe, Nevada,

on March 18, 1932, in Volume 1, Page 525 of Mortgages in the County of Humboldt, Nevada,

on March 18, 1932, in Volume 36, page 428 of the records of Box Elder County, Utah,

on March 19, 1932, in Volume 103, page 155 of the records of Salt Lake County, Utah,

on April 12, 1932, in Volume P, page 1 of the records of Tooele County, Utah.

Whereas, Irving Trust Company is now the Trustee under said Mortgage or Deed of Trust, having become successor Trustee on November 13, 1936;

Whereas, the District Court of the United States for the Northern District of California, Southern Division, instituted proceedings for the Reorganization of The Western Pacific Railroad Company under Section 77 of the Bankruptcy Act, as amended, entitled "In the Matter of The Western Pacific Railroad Company, Debtor," Docket No. 26591-S, by order entered October 11, 1943, confirmed a Plan of Reorganization of The Western Pacific Railroad Company, which Plan, provides, among other things, for the issuance of new securities to the holders of bonds under such Mortgage or Deed of Trust in payment and satisfaction of their bonds and the release and cancellation of mortgages on the property of The Western Pacific Railroad Company; and

Whereas, by order entered in said proceedings on

....., 1944, said Court directed said Irving Trust Company, as Trustee under said Mortgage or Deed of Trust, to execute and deliver to The Western Pacific Railroad Company a satisfaction and release of said Mortgage or Deed of Trust;

Now, Therefore, in consideration of the premises Irving Trust Company, as Trustee under said Mortgage or Deed of Trust, pursuant to said order dated, 1944, hereby certifies that, effective December 29, 1944, at 12:01 a.m., Pacific War Time, said Mortgage or Deed of Trust, has been satisfied and discharged and does hereby cancel and discharge said Mortgage or Deed of Trust and consents and directs that said Mortgage or Deed of Trust be discharged of record in the states and counties in which the same has been recorded, and does hereby release, remise, quitclaim, transfer, reconvey and reassign to The Western Pacific Railroad Company all of the property, both real and personal, mortgaged, conveyed or pledged by said Mortgage or Deed of Trust and now held by said Trustee thereunder;

And said Irving Trust Company as Trustee, as aforesaid, hereby agrees that it will, on the request of The Western Pacific Railroad Company and at its expense, execute, acknowledge and deliver all and every such further instruments as may be necessary or proper to cancel and discharge said Mortgage or Deed of Trust and to have the same satisfied of record.

In Witness Whereof, Irving Trust Company, as

successor Trustee, by its officers hereunto duly authorized, has executed the foregoing instrument and caused its corporate seal to be hereunto affixed this day of December, 1944.

IRVING TRUST COMPANY,
as Successor Trustee.

By

Vice President.

Attest:

.

[Appropriate acknowledgment to be supplied.]

EXHIBIT "D"

Whereas, heretofore in a proceeding in the United States District Court for the Northern District of California, Southern Division, for the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, entitled "In the Matter of The Western Pacific Railroad Company, Debtor," No. 26591-S, a Plan of Reorganization of The Western Pacific Railroad Company was approved and confirmed, and, pursuant to the provisions of said Plan of Reorganization, an order was entered on September 25, 1944, by said Court approving the use of the said debtor company, The Western Pacific Railroad Company, a corporation organized and existing under the laws of the State of California, as the reorganized company in carrying out said plan;

Whereas, the Interstate Commerce Commission, under date of October 24, 1944, in Docket #10913, made a report and order which, among other things,

approved and authorized the assumption by said The Western Pacific Railroad Company of obligations and liabilities as provided in said plan;

Whereas, pursuant to said Plan of Reorganization and to the order entered in said proceeding on, 1944, T. M. Schumacher and Sidney M. Ehrman, as Trustees of the property of said The Western Pacific Railroad Company, duly appointed in said proceedings (hereinafter called the "Trustees"), have, by deed dated December, 1944, remised, released, transferred, conveyed and quit-claimed to the undersigned, said The Western Pacific Railroad Company, all of the property, real, personal and mixed, of every kind and nature, vested in, held, possessed, used or controlled by said Trustees;

Now, Therefore, pursuant to the provisions of said order entered, 1944, and in consideration of the said release, transfer and conveyance by the Trustees, the undersigned The Western Pacific Railroad Company, for itself, its successors and assigns, makes this Agreement with said Trustees, for the benefit of said Trustees and of all other parties in interest in the above-entitled proceedings, under which agreement the undersigned does hereby:

1. Assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by said Trustees and remaining in effect on December 31, 1944, and all contracts, leases and agreements of the debtor in effect on August 2, 1935, either assumed or not dis-

affirmed by said Trustees, which remain in effect on December 31, 1944, and expenses of reorganization allowed by the Court within the maximum fixed by the Interstate Commerce Commission;

2. Assume any and all outstanding current liabilities and obligations incurred by said Trustees and without limitation thereto, any and all liabilities or obligations of the debtor in possession of said Trustees with respect to claims for personal injury or death, for loss or damage to property and generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business, including liabilities and obligations hereafter arising up to midnight December 31, 1944.

3. Without limitation of the generality of the foregoing agreements in paragraphs 1 and 2 hereof, specifically undertake to defend at its own sole cost and expense all suits and proceedings, of whatsoever character, now or hereafter instituted against the Trustees, or either of them, arising out of the possession, use or operation of the debtor's properties by the Trustees or of their conduct of the debtor's business, and to assume the conduct of all suits and proceedings, of whatsoever character, heretofore or hereafter brought by the Trustees in the discharge of their duties and responsibilities as such, and, generally, to indemnify the Trustees and save them harmless against all expense, liability,

loss, judgments, claims and demands arising out of such suits or proceedings. It is the intent of the covenants in this paragraph 3 contained that The Western Pacific Railroad Company shall assume responsibility for all such suits and proceedings to which the Trustees, or either of them, are or shall become parties, to the same effect as if The Western Pacific Railroad Company instead of the Trustees had been party thereto in the first instance.

4. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to perform the obligations of the Trustees in respect of the following:

(a) \$1,235,000 unpaid balance, principal amount of Three Per Cent. Equipment Trust Certificates, Series of 1937, issued February 1, 1937, under Agreement of same date, between J. T. Harrigan and F. E. Egly, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(b) \$1,855,000 unpaid balance, principal amount of One and Three Quarters Per Cent Equipment Trust Certificates, Series of 1941, issued August 1, 1941, under Agreement of same date, between M. J. Suydam and F. W. Walter, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(c) Conditional Sale Agreement, dated as of

May 25, 1943, between Lima Locomotive Works, Incorporated, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six steam freight locomotives.

(d) Conditional Sale Agreement, dated as of June 21, 1943, between Electro-Motive Division, General Motors Corporation and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of three 5400 H. P. diesel electric freight locomotives.

(e) Conditional Sale Agreement, dated as of June 1, 1944, between The Chase National Bank of the City of New York and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six 5400 H. P. diesel electric freight locomotives.

5. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment; such coupons being those which the Court by orders of March 11, 1936, and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds

which had been deposited with it by the debtor.

6. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, assume the liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in the said proceeding and without prejudice by reason of such proof not having been made.

This agreement shall become effective on December 29, 1944, at 12:01 a.m., Pacific War Time.

In Witness Whereof, the undersigned has caused this instrument to be executed in its behalf by its President and its corporate seal to be hereunto affixed this day of December, 1944.

THE WESTERN PACIFIC
RAILROAD COMPANY,

By.....

President.

Attest:

.....

[Appropriate acknowledgment to be supplied.]

EXHIBIT "E"

....., 1944

Reconstruction Finance Corporation
Washington, D. C.

Dear Sirs:

In consideration of the acquisition by Reconstruction Finance Corporation (hereinafter called Re-

construction) of \$10,000,000 principal amount of The Western Pacific Railroad Company First Mortgage 4% Bonds, due January 1, 1974, issued or to be issued under a Mortgage, dated as of January 1, 1939, between The Western Pacific Railroad Company and Crocker First National Bank of San Francisco, Trustees, The Western Pacific Railroad Company (hereinafter called the Railroad) hereby agrees with and represents to Reconstruction as follows:

1. The term "compensation" as used in this Agreement shall include all salaries, fees, bonuses, commissions or other payments, direct or indirect, in money or otherwise, for personal services paid or to be paid by the Railroad.

2. There are attached hereto, and made a part hereof, four schedules, as follows:

(a) Schedule A, consisting of sheets, setting forth the compensation (excluding directors' fees shown in Schedule C) paid or to be paid to officers, directors and employees of the Railroad at a rate of \$4800 or more, per year;

(b) Schedule B, consisting of sheets, setting forth the average number of employees and the total compensation paid to officers and employees of the Railroad during the year 1943, as such information is classified in Schedule 561 in form A, Annual Reports filed with the Interstate Commerce Commission;

(c) Schedule C, consisting of sheets, setting forth the compensation paid or to be paid to

the Railroad's directors and members of Executive Committee in such capacities;

(d) Schedule D, consisting of sheets, setting forth the compensation paid or to be paid to officers, directors or employees of the Railroad by any company or companies controlling, or affiliated with or controlled by, the Railroad.

3. So long as any of said Bonds are held by Reconstruction, the Railroad will not—

(a) increase the compensation, either directly or by promotion to any office or position, of

(1) any officer, director or employee, paid or to be paid compensation at a rate of not more than \$4800 per year to a rate of more than \$4800 per year; or

(2) any officer, director or employee, paid or to be paid compensation at a rate of more than \$4800 per year;

(b) elect, appoint or otherwise engage or employ to or for any office or position, any person not shown in said Schedule A, to or for any office or position at a compensation at a rate of more than \$4800 per year;

without, in each case, obtaining the prior written consent of Reconstruction.

4. Nothing contained in this Agreement shall be deemed to prohibit the Railroad from effecting any reduction in compensation below the respective amounts set forth in said Schedules, for any of its officers, directors or employees, or, in the case of a vacancy in any of the offices or positions shown in said Schedules from filling such vacancy through

promotion, new employment or otherwise, at the rate of compensation for such office or position set forth in said Schedules, or as requiring or permitting the Railroad to violate any of the provisions of the Railway Labor Act, or other federal act or executive order relative to compensation as defined herein, or any existing or future agreements made with labor organizations or groups of employees acting collectively, or of any judgment or decree of a court.

5. If any company, directly or indirectly, controlling or affiliated with, or controlled by, the Railroad, shall increase the compensation paid by it to any officer, director or employee of the Railroad, and if, after such increase, the aggregate annual compensation paid to such officer, director or employee by every such other company and by the Railroad would be in excess of \$4800, the compensation payable by the Railroad to such officer, director or employee shall be reduced in an amount equal to the amount of such increase or the amount of such excess, whichever shall be the less. The Railroad shall give immediate written notice to Reconstruction of any such increase by any such Company of any such compensation paid or to be paid any officer, director or employee of the Railroad.

6. From time to time, upon request of Reconstruction, the Railroad shall furnish, in form attached, schedules of all the compensation currently paid to the officers, directors and employees of the Railroad.

7. This Agreement shall be binding upon the successors and assigns of the Railroad, and shall enure to the benefit of any department, branch, or agency of the Government which may be successor to or assign of Reconstruction.

Respectfully submitted,

THE WESTERN PACIFIC
RAILROAD COMPANY.

By.....
President.

Attest:

.....
Secretary.

EXHIBIT "F"

The Western Pacific Railroad Company

Instructions to Guaranty Trust Company of New
York, as Depositary and Exchange Agent

New York, N. Y.

December ..., 1944

Guaranty Trust Company of New York

140 Broadway

New York 15, N. Y.

Gentlemen:

The designation of Guaranty Trust Company of New York as Depositary and Exchange Agent under the Plan of Reorganization of The Western Pacific Railroad Company (hereinafter called the Railroad Company), confirmed October 11, 1943, has been approved by the District Court of the

United States for the Northern District of California, Southern Division, by Order entered October 23, 1944, in the proceedings now pending in said Court for the reorganization of the Railroad Company, and said Court has likewise approved the instructions given to you herein as such Depositary and Exchange Agent.

The maximum amount of securities to be issued under the Plan and delivered by you as Depositary and Exchange Agent are as follows:

First Mortgage 4% Bonds, Series

A, due January 1, 1974.....\$10,000,000

General Mortgage 4½% Income

Bonds, Series A, due January

1, 2014\$21,219,000

Preferred Stock, Series A (\$100

par value)\$31,850,200

Common Stock, no par value....319,032.767 shares

General Mortgage Income Bonds are not issuable in denominations of less than \$100 and fractional shares of stock will not be issued. These fractions are to be covered by Scrip, as hereinafter provided.

Cash payments are to be distributed with the securities to be delivered, as hereinafter provided.

The claimants entitled to receive securities and cash are (1) holders of the Railroad Company's present First Mortgage Bonds, being the Bonds issued under the Railroad Company's First Mortgage, dated the twenty-sixth day of June, 1916, due March 1, 1946, (2) Reconstruction Finance Cor-

poration, (3) The Railroad Credit Corporation, and (4) A. C. James Co.

The undersigned Reorganization Committee will, under the terms of the order of the District Court of, 1944, cause to be published a notice to security holders informing them that they are entitled to present to you the obligations of the Railroad Company now held by them, and to receive on and after December 29, 1944, in exchange therefor the new securities and cash to which they are entitled; in addition all known holders of First Mortgage Bonds due March 1, 1946, and other claimants mentioned above will be notified by circular or other letter giving the basis of exchange. Letters of transmittal and instructions to First Mortgage Bondholders for use in surrendering their bonds for exchange will also be sent to all known holders of such bonds and you will be furnished with an additional supply of such letters of transmittal and instructions. All First Mortgage Bonds surrendered to you should be accompanied by such letters of transmittal or by written instructions to effect the exchange thereof under the Plan of Reorganization. In case a letter of transmittal is signed by a responsible bank or broker in behalf of the owner, no evidence of authority to act as agent need be required by you. No special letters of transmittal have been prepared for claimants other than First Mortgage Bondholders

First Mortgage 5% Series A Bonds due March 1, 1946, are outstanding in the amount of \$49,290,100

including \$300 of Bond Scrip Certificates. These scrip certificates (aggregating \$300) shall be treated as Bonds for a like amount if surrendered to you, provided they are surrendered in principal amounts of \$100 or multiples thereof.

The denominations of outstanding First Mortgage Bonds in coupon form are \$100, \$500 and \$1,000. Except for one bond in the amount of \$350,000, in the denominations of outstanding First Mortgage Bonds in fully registered form are \$1,000 and \$10,000. First Mortgage Bonds in registered form surrendered to you as Depositary and Exchange Agent need not be endorsed or accompanied by instruments of transfer unless the new securities are to be registered in a name other than the name in which the surrendered bonds are registered or unless the checks for the adjustment payments to accompany such new securities are to be in names other than the name in which the surrendered bonds are registered. First Mortgage Bonds in coupon form should either have March 1, 1934, and subsequent coupons attached or should be accompanied by an affidavit and indemnity agreement (without surety) on your customary form for any missing coupons. In case coupons due prior to March 1, 1934, are attached to any bonds received by you by mail, you are to detach such coupons and return the same to the party on whose behalf the bonds are presented. Certain coupons due March 1, 1934, and subsequent bear a stamp regarding the deferment of the interest represented thereby, but it is imma-

terial whether such stamp is or is not on any coupons. In the event that one or more First Mortgage Bonds shall be mutilated, destroyed, lost or stolen, you, as Depositary and Exchange Agent, are authorized upon receipt of satisfactory evidence of such destruction, loss or theft, or upon the surrender of the bond or bonds, if mutilated, and upon receipt of indemnity satisfactory to you and to the Railroad Company (subject however to the approval of the Executive Committee or Board of Directors of the Railroad Company evidenced by a general or special resolution, a certified copy of which is to be furnished to you), to deliver new securities of such nature and amount and such cash as would have been deliverable against such bond or bonds in the absence of such mutilation, destruction, loss or theft.

Of said First Mortgage Bonds ten bonds, to wit: those numbered M-3595, M-3596, M-21612, M-21613, M-21614, M-21615, M-21616, M-21618, M-21619 and M-21620 are to be presented without coupons maturing prior to September 1, 1935, and in the delivery of securities each such bond is to receive a lesser amount of common stock than the generality of such bonds; and certain common stock, as hereinafter provided, is to be delivered to The Western Pacific Railroad Corporation, a Delaware Corporation, upon surrender of coupons numbered 36 and 37 with respect to said bonds.

Treatment of First Mortgage Bondholders

Upon receipt of First Mortgage Bonds due March 1, 1946, with coupons and/or indemnity agreement as aforesaid, you as Depositary and Exchange Agent are to deliver new securities and pay cash to the persons surrendering such bonds, at the rates indicated below. The securities to be delivered are as follows:

Principal Amount of Old First Mortgage Bonds Received	New Preferred Stock of \$100 par Value per Share (or Scrip) to be Delivered
\$ 100.	3/5 shares
500.	3 shares
1,000.	6 shares
10,000.	60 shares

New General Mortgage Income Bonds (or Scrip) to be Delivered	New Common Stock (or Scrip) to be Delivered
\$ 40.	.467 shares
200.	2.335 shares
400.	4.67 shares
4,000.	46.7 shares

With the delivery of said securities, cash adjustment payments are to be made as follows:

(a) with each General Mortgage 4½% Income Bonds, Series A, a cash adjustment payment at the rate of \$22.50 for each \$100 of the principal amount thereof,

(b) with each share of Preferred Stock, Series A, a cash adjustment payment of \$15.81,

(c) with each share of Common Stock, a cash adjustment payment of \$9.00,

(d) with Scrip Certificates for General Mortgage 4½% Income Bonds, Series A, for Preferred Stock, and for Common Stock, proportionate cash adjustment payments based on the amount of the Scrip Certificates are to be made, that is to say, with each Scrip Certificate for General Mortgage Bonds, the amount of which Scrip Certificate is \$20, a payment of \$4.50; with each scrip certificate representing 1/5 of a share of preferred stock, a payment of \$3.16; and with each Scrip Certificate representing a fractional amount of Common Stock, a payment of a proportionate part of \$9.

The new securities to be delivered to the First Mortgage Bondholders are in settlement for their claims with respect to principal and accrued and unpaid interest to January 1, 1939. With respect to each of the aforesaid ten bonds numbered M-3595, M-3596, M-21612, M-21613, M-21614, M-21615, M-21616, M-21618, M-21619 and M-21620, the amount of Common Stock to be delivered shall be 3.356 shares instead of 4.67 shares as indicated in the foregoing schedule. Against delivery of coupons numbered 36 and 37 appurtenant to said bonds, there shall be issued and delivered to or upon the order of The Western Pacific Railroad Corporation,

a Delaware corporation, for each such coupon .437 shares of Common Stock and the cash adjustment payment with respect thereto shall be paid to said corporation or upon its order.

The adjustment payments in cash to be made as indicated above are based upon an order of the District Court of the United States for the Northern District of California, Southern Division, entered September 25, 1944, which determined the available net income of the Railroad Company for the calendar years 1939-1943, inclusive, and the allocation of such available net income, including the said adjustment payments to be made to security holders at the time of the consummation of the plan of reorganization. Such adjustment payments are, as to the General Mortgage Income Bonds at the rate of $22\frac{1}{2}\%$ of the principal amount thereof; as to the new Preferred Stock at the rate of \$15.81 per share and as to the new Common Stock at the rate of \$9 per share. These adjustment payments are not made as either interest or dividends. The General Mortgage Income Bonds will draw interest from January 1, 1944, and the shares of stock to be delivered will not be entitled to dividends for any period prior to January 1, 1944.

First Mortgage Bonds of 1946, presented to you for exchange for the new securities and adjustment payments, are to be cancelled and cremated by you.

Treatment of Claim of Reconstruction Finance Corporation

Upon

(1) receipt from Reconstruction Finance Corporation of the following certificates of indebtedness issued by the Trustees:

Certificates numbered 1 to 10 both inclusive, in bearer form, dated the first day of December, 1938, originally payable December 1, 1939, bearing interest at the original rate of 3% per annum, each in the original principal amount of \$1,000,000, said certificates being signed in the name of T. M. Schumacher and Sidney M. Ehrman, as Trustees, by M. J. Curry, Asst. Treasurer and countersigned by the Deputy Clerk of the District Court of the United States for the Northern District of California, Southern Division;

(2) the payment by Reconstruction Finance Corporation of \$6,000,000 (being the cash collateral heretofore deposited as security for said Certificates);

(3) the surrender of the following notes of the Railroad Company aggregating \$2,963,000 in principal amount, held by Reconstruction Finance Corporation:

Note dated March 1, 1932,

due March 1, 1935.....\$ 699,000

Note dated June 29, 1932,	
due June 29, 1935.....	734,584
Note dated August 1, 1932,	
due August 1, 1935.....	136,045
Note dated August 30, 1932,	
due August 30, 1935.....	1,293,440
Note dated March 25, 1933,	
due March 25, 1936.....	99,931

(4) the surrender of the following bonds of the Railroad Company aggregating \$10,750,000 in principal amount held by Reconstruction Finance Corporation as collateral for said notes:

General and Refunding Mortgage Bonds Series A issued by the Railroad Company in temporary form dated the 1st day of January, 1932, No. T-2, for the principal amount of \$8,750,000.

General and Refunding Mortgage Bond Series B issued by the Railroad Company in temporary form, dated the 1st day of July, 1932, No. T-1, for the principal amount of \$2,000,000 and

(5) the payment by Reconstruction Finance Corporation of \$. (being the sum of \$1,075,000, less \$. interest upon said Trustees' Certificates to December 29, 1944, and less \$., being an amount equal to interest on \$10,000,000 of the new First Mortgage 4% Bonds from December 29, 1944, to January 1, 1945),

you are to deliver to Reconstruction Finance Corporation:

\$10,000,000 principal amount of the new First Mortgage Bonds, in temporary registered form, in one piece bearing interest from January 1, 1945,

\$ 1,185,200 principal amount of the new General Mortgage 4½% Income Bonds, Series A, in temporary form, in the following denominations, to wit:

118 bonds of the denomination of
\$10,000

1 bond of the denomination of
\$5,000, and

2 bonds of the denomination of
\$100.

17,778 shares of the new Preferred Stock, in temporary form, in the following denominations, to wit:

177 certificates for 100 shares, and
1 certificate for 78 shares.

15,788 shares of the new Common Stock in temporary form in the following denominations, to wit:

157 certificates for 100 shares, and
1 certificate for 88 shares,

and you are to pay to Reconstruction Finance Corporation \$689,832.18 in cash, being the aggregate of (a) \$266,670, the cash distribution with respect to the General Mortgage Bonds so delivered, (b)

\$281,070.18, the cash distribution with respect to the Preferred Stock so delivered and (c) \$142,092, the cash distribution with respect to the Common Stock to be delivered.

Treatment of Claim of The Railroad Credit Corporation

Upon

(1) surrender to you of the following notes of the Railroad Company held by The Railroad Credit Corporation:

Note dated June 29, 1932, due February 28, 1934, for the principal sum of\$1,303,000

Note dated March 25, 1933, due March 24, 1935, for the principal sum of\$1,293,439

and (2) the surrender of the following bonds of the Railroad Company held as security for said notes:

General and Refunding Mortgage Bond, Series A, No. T-5, dated the first day of January, 1932; in the principal amount of \$2,000,000,

General and Refunding Mortgage Bond, Series B, No. T-2, dated the first day of July, 1932, in the principal amount of \$2,000,000,

you are to deliver to The Railroad Credit Corporation the following:

\$154,080 principal amount of the new General Mortgage 4½% Income Bonds, Series A, in temporary form, in the following denominations, to wit:

15 Bonds of the denomination of \$10,000 each

4 Bonds of the denomination of \$1,000 each

Scrip certificates representing said bonds in the amount of \$80.

2,416.4 shares of the new Preferred Stock, in temporary form in the following denominations:

24 Certificates for 100 shares each

1 Certificate for 16 shares

Scrip Certificates for 2/5 of a share of the new Preferred Stock,

not more than 35,425 shares of Common Stock (or scrip certificates for fractional shares) the amount of such shares so to be distributed to be reduced by one (1) share for each \$62 of the amounts to which the debtor and its subsidiaries became entitled under the marshalling and distributing plan of 1931, insofar as such amounts were retained by The Railroad Credit Corporation and applied by it, after December 31, 1938, and prior to the distribution of such securities, to the obligations of the Railroad Company to The Railroad Credit Corporation.

Prior to December 29, 1944, you will be notified of the amount of such reduction. The balance of said 35,425 shares of Common Stock, together with the cash distribution with respect thereto shall be held until determination of the appeal of The Railroad Credit Corporation from the order of September 14, 1944, with respect to such reduction and if said appeal be successful shall be then distributed and paid over to The Railroad Credit Corporation; otherwise to be returned to the Railroad Company:

and you are to pay to The Railroad Credit Corporation a sum which shall be the aggregate of (a) \$34,668 being the cash distribution with respect to the General Mortgage Income Bonds so delivered; (b) \$38,203.28 being the cash distribution with respect to the Preferred Stock so delivered; (c) a sum which shall be at the rate of \$9 a share on the Common Stock and scrip certificates therefor so delivered; and (d) \$72.

Treatment of Claim of A. C. James Co.

Upon

(1) surrender to you of the following notes of the Railroad Company to A. C. James Co.

Note Dated March 28, 1932—\$4,851,000.00
Due March 28, 1935

Note Dated May 31, 1932—\$148,800.00 Due
May 31, 1935

and (2) the surrender of the following bonds of the Railroad Company held as security for said notes:

General and Refunding Mortgage Bond, Series A, No. T-3, in temporary form, dated January 1, 1932, in the principal amount of \$433,500.

General and Refunding Mortgage Bond, Series A, No. T-4, in temporary form in the principal amount of \$186,000.

General and Refunding Mortgage Bond, Series A, No. T-6, in temporary form in the principal amount of \$3,630,000.

you are to deliver to A. C. James Co. or the holder of said notes:

\$163,680 principal amount of the new General Mortgage Bonds, in temporary form, in the following denominations:

16 Bonds of the denomination of...	\$10,000
3 Bonds of the denomination of...	1,000
1 Bond of the denomination of...	500
1 Bond of the denomination of...	100
Scrip certificates representing said bonds in the amount of...	80

2,567 shares of the new Preferred Stock, in temporary form, in the following denominations:

25 Certificates for 100 shares each
1 Certificate for 67 shares

37,635 shares of the new Common Stock, in temporary form, in the following denominations:

376 Certificates for 100 shares each

1 Certificate for 35 shares

and you are to pay to the holder of said notes the sum of \$416,227.27, being the aggregate of (1) \$36,828, the cash distribution with respect to the General Mortgage Bonds so delivered, (2) \$40,584.27 the cash distribution with respect to the Preferred Stock so delivered, (3) \$338,715, the cash distribution with respect to the Common Stock so delivered and (4) the sum of \$100.

Of the collateral for the notes of Reconstruction Finance Corporation, The Railroad Credit Corporation and the A. C. James Co., all bonds of the debtor are to be cancelled and cremated by you and the other obligations returned to the Railroad Company.

Crocker First National Bank of San Francisco, California, is Corporate Trustee of the new First Mortgage Bonds and it has been instructed to authenticate and deliver to you the \$10,000,000 of Series A Bonds of that issue which you are to deliver to the Reconstruction Finance Corporation.

The Chase National Bank of the City of New York is Corporate Trustee of the new General Mortgage Income Bonds and it has been instructed to honor your requisitions for General Mortgage 4½% Income Bonds, Series A, to be delivered by you as set out above.

All new General Mortgage Income Bonds so requested by you will be dated January 1, 1939. The denominations are \$100., \$500., \$1,000., \$5,000. and \$10,000. Scrip in lieu of fractional amounts of new General Mortgage Income Bonds needed by you for exchange are to be obtained by you from the Scrip Agent as hereinafter provided.

Central Hanover Bank and Trust Company is Transfer Agent for the new Preferred and Common Stocks and it has been instructed to honor your requisitions for not exceeding 318,502 shares of new Preferred Stock and 319,032 shares of new Common Stock. Both new Common and new Preferred Stock Certificates are issuable in denominations of 100 shares and less than 100 shares. Only full shares of stock are to be requisitioned from Central Hanover Bank and Trust Company. Scrip in lieu of fractional shares are to be requisitioned from the Scrip Agent in accordance with the succeeding paragraph.

City Bank Farmers Trust Company is Scrip Agent for scrip certificates to be issued in respect to the General Mortgage Income Bonds and Preferred and Common Stocks. Bond scrip is issuable in the denomination of \$20., Preferred Stock scrip in the denomination of one-fifth of a share, and Common Stock scrip will be in fractional denominations of which the denominator in each case is 1,000. The Scrip Agent has been authorized to honor your requisitions for scrip of all three classes required by you in connection with exchanges. The Corporate Trustee of the General Mortgage Income Bonds has

been instructed to reserve for account of the Scrip Agent sufficient bonds to cover outstanding scrip in accordance with the requirements of the Scrip Agreement between the Company and City Bank Farmers Trust Company dated December 28, 1944, upon notice of issuance of scrip by the Scrip Agent. Similarly the Transfer Agent of the new Preferred and new Common Stock has been instructed to reserve sufficient stock for account of the Scrip Agent in respect to outstanding Preferred and Common scrip, upon notice of issuance of such scrip. The Scrip Agreement provides that all classes of scrip issued thereunder become void on and after January 1, 1950, and permits the sale of the Bonds and Stock reserved for the scrip after January 1, 1948. In the event of redemption or sale of Bonds or Stock reserved for scrip, the scrip certificates are entitled to their pro rata share of the net proceeds including accrued interest and dividends. When any of these events occur it will no longer be possible to issue scrip certificates and at that time the undersigned Railroad Company will provide you with supplemental instructions as to procedure and an amount of cash estimated to be necessary to be paid to the old security holders in lieu of scrip.

Upon or prior to the opening of business on December 29, 1944, you will be put in funds for the account of The Western Pacific Railroad Company to cover the adjustment payments in cash to be made in connection with the issue of the new securities as set out above. Separate checks are to be

given for such adjustment payments with respect to Bonds, Preferred Stock and Common Stock respectively. At the date fixed for the consummation of the plan, i.e., December 29, 1944, there will be no interest or dividends payable on the new Bonds and Stocks requisitioned by you. In the case of subsequent presentations of existing securities for exchange, the Corporate Trustee of the new General Mortgage Income Bonds and the Transfer Agent, for the new Common and Preferred Stocks have been instructed to send you, along with any such new Bonds and Stock requisitioned by you, checks for such interest and dividends as may hereafter be paid upon such securities, such checks to be drawn to the order of the holders indicated on your requisitions. Such checks should be delivered by you to the respective holders along with the new securities.

Prior to the commencement of the exchange we will furnish you with an opinion of our counsel as to whether or not withholding tax is required to be deducted by you on payment of the cash distribution to non-resident alien holders and such opinion will also cover the basis of transfer tax where the new securities are to be issued in a name other than that of the owner of the securities deposited.

The notes received by you from the Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company should be fully cancelled by you and returned to the Railroad Company.

There will be delivered to you prior to commencement of exchange the following documents:

1. Certified copy of Resolution or other document of the Reorganization Committee designating you as Depositary and Exchange Agent;

2. Certified copy of Resolution adopted by the Board of Directors of the Railroad Company authorizing execution of this letter agreement;

3. Certified copy of Order or Orders of the Federal Court approving your appointment, and approving these instructions and generally authorizing the consummation of the reorganization;

4. Copy of published notice over the signature of the Reorganization Managers relative to the commencement of exchange;

5. Supply of letters of transmittal and instructions to First Mortgage Bondholders and circular letters to such Bondholders regarding the basis of the exchange;

6. Copies of instructions given by the Railroad Company to the Corporate Trustee of the new General Mortgage Income Bonds, the Transfer Agent of the new Preferred and Common Stock and the Scrip Agent with respect to delivery of securities and future interest and dividends upon your requisition;

7. Letters from the General Mortgage Corporate Trustee and Transfer Agent and Scrip Agent of the new securities that they are prepared to honor your requisitions for the amount of new securities required for the exchange;

8. Specimens of old First Mortgage Bonds and all new securities; copies of new Mortgages and Scrip Agreement;

9. List of stop payment orders on old First Mortgage Bonds.

It is understood that these instructions may from time to time be supplemented or amended by additional instructions in writing, either upon your request to the undersigned or upon the initiative of the Reorganization Committee or the Railroad Company. Such instructions may be given either by the Reorganization Committee or by the President or Vice President, Secretary or Treasurer of the Railroad Company or by the Railroad Company and the Reorganization Committee jointly. If given by the Reorganization Committee such instructions will be signed by their Chairman or by any two members.

As Depositary and Exchange Agent you may advise with counsel for either of the undersigned or your own counsel in any matter arising in connection with the Depositary and Exchange Agency, and you shall be fully protected in relying upon the advice of such counsel.

It is understood and agreed that you are not to

be in any way responsible for the form or validity of any security delivered by you hereunder, and that you shall be fully protected in accepting any security, endorsement, assignment, instruction or other paper or document believed by you to be valid or genuine, and to have been signed by or on behalf of the proper person or persons. The undersigned Railroad Company agrees to indemnify and hold you harmless from and against any and all claims or liabilities asserted against you by reason of any action or actions taken by you pursuant to the instructions herein contained. Without limiting the foregoing indemnity provisions, it is hereby agreed that the same apply to and cover liability for taxes and other governmental charges which you may at any time incur by reason of the receipt or delivery of securities in connection with effecting exchanges hereunder or the receipt or the holding of payment of any cash in connection with your duties hereunder.

At any time after January 1, 1955, the Railroad Company may request you to terminate your duties as Depositary and Exchange Agent, and after the date fixed by the Railroad Company for such termination, you shall pay and deliver to the Railroad Company any cash and securities held by you as Depositary and Exchange Agent. Thereafter all exchanges of securities under the Plan of Reorganization shall be made by the Railroad Company in the discretion and under such conditions as may be prescribed by its Board of Directors or Executive

Committee. Until such time as your duties as Depository and Exchange Agent are terminated, all cash and any securities which may be held by or reserved for you for distribution under the Plan of Reorganization shall be held in trust for the purposes herein expressed.

Yours very truly,

.....
.....

Reorganization Committee
THE WESTERN PACIFIC
RAILROAD COMPANY,

By
(Vice) President

Attest:

.....
Assistant Secretary.

We agree to act in accordance with the foregoing letter agreement, a counterpart of which has been received and retained by us.

GUARANTY TRUST COMPANY
OF NEW YORK, as Depository
and Exchange Agent

By
Trust Officer.

Dated:

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

C. W. CALBREATH

Clerk, District Court of the
U. S., Northern District of
California.

[Seal] By A. T. ALLEN
Deputy Clerk.

EXHIBIT No. 2

In the District Court of the United States for the
Northern District of California, Southern Division.

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,
PANY,

Debtor.

FINAL ORDER

The petition filed March 18, 1946, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the duly constituted Reorganization Committee designated to carry out the plan of reorganization of The Western Pacific Railroad Company above-named, for an order approving their expenses, dis-

charging the Committee and terminating the proceedings duly came on to be heard on March 28, 1946, and was heard and has been submitted.

The Court being fully advised in the premises finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court dated and filed March 18, 1946, and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) All of the business, assets and property constituting the debtor's estate of every kind and character, real, personal and mixed, and all of the right title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees in Reorganization, vested in and became the absolute property of The Western Pacific Railroad Company on December 29, 1944, free and clear of all rights, claims, interests, liens and encumbrances of the former stockholders and creditors of the debtor company and all other persons, except as otherwise provided and directed in the order of this Court in this proceeding dated and entered November 27, 1944; and The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order.

(b) The plan of reorganization of The Western Pacific Railroad Company, which was duly confirmed by order of this Court dated and entered October 11, 1943, has been fully and properly carried out and put into effect in accordance with the terms and provisions of said plan and the orders of this Court heretofore entered in this proceeding; all acts and things required by the order of this Court dated and entered November 27, 1944, to be done or performed in order to consummate said plan, have been properly done or performed; the exchange of more than 99% of the principle amount of securities of the reorganized company has been effected in accordance with the plan of reorganization and the orders of this Court; and adequate and proper arrangements have been made for the exchange of the remainder of said securities.

(c) The reasonable and necessary expenses of the Reorganization Committee in carrying out and putting into effect the plan of reorganization, as disclosed by Schedule "B" annexed to the petition for this order, filed by said Committee and supported by evidence introduced at the hearing upon said petition, exclusive of the fees and expenses of the attorneys for said Committee, which have heretofore been approved and allowed by order of this Court filed December 10, 1945, are within the maximum limits approved by the Interstate Commerce Commission and authorized by this Court by order filed October 23, 1944, and should be finally approved and allowed.

(d) Frederick H. Ecker, Frank C. Wright and

Robert E. Coulson, members of the duly constituted Reorganization Committee, have fulfilled their functions, faithfully performed their duties as members of the Reorganization Committee and now have no further duties and should be discharged.

(e) The plan of reorganization having been carried out and put into effect in accordance with the terms of the plan and the orders of this Court, a final decree should be entered in this cause, subject only to the reservations of the jurisdiction hereinafter made in this decree.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed:

1. That these proceedings be and they hereby are terminated subject only to the reservations of jurisdiction hereinafter made by the Court in this order, and the reservations of jurisdiction contained in the order of this Court discharging the Trustees of the Debtor's estate, dated and entered May 21, 1945.

2. That the expenses incurred by the Reorganization Committee in consummating, carrying out and putting into effect the plan of reorganization, as shown by the summary which is attached as Exhibit "B" to the petition for this order, filed by the Reorganization Committee, are hereby in all respects finally approved and allowed.

3. That the actions of the Reorganization Committee in putting into effect and carrying out the plan of reorganization and the orders and directions

of this Court relative thereto, are hereby approved, ratified and confirmed.

4. That Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the members of the Reorganization Committee herein, be and each of them is hereby discharged and relieved from all further duties herein.

5. That the order of this Court dated and entered November 27, 1944, in this proceeding shall remain in full force and effect in so far as said order has not been fully carried out.

6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against The Western Pacific Railroad Company, or against the successors or assigns of said company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, per-

sonal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings.

7. The Western Pacific Railroad Company is hereby ordered and directed to reimburse, indemnify and hold harmless the members of the Reorganization Committee, or any of them, or any person employed by them, against any loss or expense arising out of or in connection with carrying out and putting into effect in good faith the plan of reorganization, including, without limitation of the generality of the foregoing, the contingent tax liability described in the order of the Interstate Com-

merce Commission of September 7, 1944, and allowed in the order of this Court entered October 23, 1944.

8. The Western Pacific Railroad Company is hereby directed to give notice of the entry of this final order by mailing, postage prepaid, a copy of this order to the Trustees of the Debtor's estate, the Reorganization Committee, each party of record in the reorganization proceedings before this Court or the Interstate Commerce Commission (or the counsel for each such party), and to cause promptly to be published a notice of the entry of this final order, setting forth in said notice the complete text of this order as certified by the clerk of this Court, such publication to be made once in each of the following: A daily newspaper of general circulation in the City of San Francisco, California; a daily newspaper of general circulation in the City of New York, New York; and a daily newspaper of general circulation in the City of Chicago, Illinois. Proof of such service and publication shall be filed by said Company with the Clerk of this Court within thirty days after the completion of the same.

9. The Court hereby reserves jurisdiction to take such further proceedings as may be proper or necessary to enforce and make effective any direction or other provision contained in the order of this Court, filed November 27, 1944, in this proceeding, to enforce and make effective the terms and provisions of this final decree and, if necessary, to give instructions to The Western Pacific Railroad Company, upon application by said Company, with respect to

carrying out the provisions of said order filed November 27, 1944, and of this order; to take such further proceedings as may be proper or necessary in connection with any appeal or appeals prosecuted from any order of this Court, in this proceeding; and to take such further proceedings as may be necessary or proper in connection with any expenses or liabilities within the provisions of the order of this Court filed October 23, 1944, or otherwise, which may hereafter be asserted against the Reorganization Committee, its agents or attorneys, in connection with carrying out and putting into effect the plan of reorganization.

10. Except as hereby specifically provided in the reservations of jurisdiction set forth in Paragraph 9 above, and except as provided in the reservations of jurisdiction of the order of this Court filed May 21, 1945, discharging the Trustees of the Debtor's estate, the reorganization proceedings in this Court, entitled in the Matter of the Western Pacific Railroad Company, Debtor, No. 26591-S, are hereby terminated and the case is closed.

Dated: March 28, 1946.

A. F. St. SURE,
District Judge.

[Endorsed]: Filed Mar. 28, 1946.

EXHIBIT No. 3

In the District Court of the United States, for the Northern District of California, Southern Division.

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER AUTHORIZING ESTABLISHMENT
OF A RESERVE FUND FOR CONTINGENT TAX LIABILITIES

The petition filed February 21, 1944, by T. M. Schumacher and Sidney M. Ehrman, the Trustees of the properties of the Debtor above-named, for authority to establish a reserve fund of \$7,100,000 for contingent tax liabilities, came on duly to be heard and was heard this day and thereupon submitted. Good cause appearing therefore, the Court being fully advised, finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court, that all of the averments of said petition are true, and that it is for the best interests of the estate of the Debtor that this order be made.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the Trustees are hereby authorized to establish, with funds in their hands belonging to

the estate of the Debtor and derived from the earnings of the railroad of the Debtor during the year 1943, a reserve fund in the amount of \$7,100,000, to be designated as the "Reserve Fund for Contingent Tax Liabilities," to be invested in United States Treasury securities, and to be used for the payment of any Federal income and excess profits taxes which may be found due for the year 1943.

Dated: March 3, 1944.

A. F. St. SURE,
Judge.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT
THE WESTERN REALTY COMPANY

Comes now the defendant The Western Realty Company, and answering the complaint of plaintiff herein, respectfully shows and alleges:

I.

Denies each and every allegation contained in paragraphs I and II of the complaint, except that said defendant admits that it is a Colorado corporation, that the plaintiff, The Western Pacific Railroad Corporation, is a Delaware corporation, that the defendants The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development

Company are California corporations, and that Deep Creek Railroad Company was formerly a Utah corporation and was dissolved prior to the commencement of this action.

II.

Denies each and every allegation contained in paragraph III of the complaint, except that said defendant admits that this is a civil action between citizens of different states and that the amount in controversy exceeds the sum of \$5,000, exclusive of interest and costs.

III.

Denies each and every allegation contained in paragraph IV of the complaint, except that said defendant admits that, during the years 1942 and 1943 and the first four calendar months of the year 1944, the plaintiff and the above-named defendant corporations constituted an affiliated group of corporations within the meaning of the Internal Revenue Code and income and excess profits tax returns for said years were filed on a consolidated basis by the plaintiff on behalf of said affiliated group of corporations, that the consolidated returns for the year 1942 reported income and excess profits tax in the amount of \$4,201,821.54, the whole of which sum was paid in 1943 with funds supplied by the Reorganization Trustees of the defendant The Western Pacific Railroad Company, that the consolidated returns for the year 1943 and the first

four months of 1944 reported no taxable income, and that the plaintiff filed in 1945 a claim for refund of said sum of \$4,201,821.54 theretofore paid as income and excess profits tax for the year 1942, together with interest thereon.

IV.

Denies each and every allegation contained in paragraphs V, VI and VII of the complaint.

V.

The complaint fails to state a claim against the defendant The Western Realty Company upon which relief can be granted.

Wherefore, the defendant The Western Realty Company demands judgment that the complaint of the plaintiff herein be dismissed as to said defendant, together with the costs and disbursements of this action.

PILLSBURY, MADISON &
SUTRO,

/s/ FELIX T. SMITH,

/s/ EVERETT A. MATHEWS,

WHITMAN, RANSOM,

COULSON & GOETZ,

Attorneys for defendant The
Western Realty Company.

[Endorsed]: Filed Dec. 30, 1946.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM OF DEFENDANTS, THE WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY COMPANY, DELTA FINANCE CO., LTD., AND STANDARD REALTY AND DEVELOPMENT COMPANY

Now comes the Plaintiff and for its Reply to the Counter-claim of the answering Defendants the Plaintiff denies all of the allegations thereof, being paragraphs of the Counterclaim numbered I, II, III, IV and V, to the extent that such allegations are inconsistent with the Plaintiff's Bill of Complaint, and denies categorically the allegations of paragraph V that the Plaintiff threatens to apply to its own use and benefit any sums of money refunded under its refund claim or any other funds to which the Bill of Complaint relates except in accordance with the decree and judgment of this Court as prayed in its Bill of Complaint.

Wherefore, plaintiff prays that said counterclaim be dismissed, and for such other and further relief as may be proper.

Dated: March 4, 1947.

THE WESTERN PACIFIC
RAILROAD CORPORATION,
Plaintiff,

By /s/ LEROY R. GOODRICH,
Its Attorney.

Of Counsel:

FRANK G. NICODEMUS, JR.,
A. PERRY OSBORN.

[Endorsed]: Filed March 5, 1947.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 26508-G

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Plaintiff,

vs.

THE WESTERN PACIFIC RAILROAD COM-
PANY, SACRAMENTO NORTHERN RAIL-
WAY, TIDEWATER SOUTHERN RAIL-
WAY, DEEP CREEK RAILROAD
COMPANY, THE WESTERN REALTY
COMPANY, THE STANDARD REALTY
AND DEVELOPMENT COMPANY and
DELTA FINANCE CO., LTD.,

Defendants.

* * *

In the Matter of:

THE WESTERN PACIFIC RAILROAD COM-
PANY,

Debtor.

* * *

RUSSELL M. VAN KIRK, HENRY OFFER-
MAN and J. S. FARLEE & CO., INC., a
Corporation,

Applicants for Intervention.

ORDER GRANTING LEAVE TO INTERVENE

Good Cause Appearing Therefor, it is hereby Ordered that Russell M. Van Kirk, Henry Offerman and J. S. Farlee & Co., Inc., a corporation, be and they are hereby granted leave to intervene as plaintiffs in the above-entitled action and to file herein their Complaint in Intervention which accompanies and is annexed to their Notice of Motion for Leave to Intervene dated March 11, 1947.

Done in Open Court this 7th day of April, 1947.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed April 7, 1947.

In the District Court of the United States for the
Northern District of California, Southern Division
No. 26508-G

**THE WESTERN PACIFIC RAILROAD COR-
PORATION,**

Plaintiff,

vs.

**THE WESTERN PACIFIC RAILROAD COM-
PANY, SACRAMENTO NORTHERN RAIL-
WAY, TIDEWATER SOUTHERN RAIL-
WAY, DEEP CREEK RAILROAD
COMPANY, THE WESTERN REALTY
COMPANY, THE STANDARD REALTY
AND DEVELOPMENT COMPANY and
DELTA FINANCE CO., LTD.,**

Defendants.

RUSSELL M. VAN KIRK, HENRY OFFER-
MAN and J. S. FARLEE & CO., INC., a Cor-
poration,

Plaintiffs in Intervention,

vs.

THE WESTERN PACIFIC RAILROAD COM-
PANY, SACRAMENTO NORTHERN
RAILWAY, TIDEWATER SOUTHERN
RAILWAY, DEEP CREEK RAILROAD
COMPANY, THE WESTERN REALTY
COMPANY, THE STANDARD REALTY
AND DEVELOPMENT COMPANY, DELTA
FINANCE CO., LTD., and THE WESTERN
PACIFIC CORPORATION,

Defendants in Intervention.

* * *

In the Matter of:

THE WESTERN PACIFIC RAILROAD COM-
PANY,

Debtor.

COMPLAINT IN INTERVENTION

Come now the above named plaintiffs in interven-
tion, after leave of court first had and obtained, and
complaining of defendants in intervention in the
right of The Western Pacific Railroad Corporation
and on behalf of themselves and all other stockhold-
ers of said corporation similarly situated, file this,
their complaint in intervention, and allege as fol-
lows, to wit:

I.

Plaintiffs in intervention, Russell M. Van Kirk and Henry Offerman, are each a citizen of the State of New Jersey and plaintiff in intervention, J. S. Farlee & Co., Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

II.

Defendant in intervention, The Western Pacific Railroad Corporation (hereinafter referred to as the "Corporation"), in behalf of which plaintiffs in intervention have intervened in this action, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and each and all of the remaining defendants in intervention are corporations duly organized and existing under and by virtue of the laws of the State of California, except that defendants in intervention, The Western Realty Company and Deep Creek Railroad Company, are corporations duly organized and existing under and by virtue of the laws of the States of Colorado and Utah, respectively. Defendant in Intervention, The Western Pacific Railroad Company, is hereinafter referred to as the "Railroad Company."

III.

(a) This is a civil action between citizens of different states and the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00; that this action in intervention is not a

collusive one to confer upon this court jurisdiction of an action of which it would not otherwise have jurisdiction.

(b) From on or about August 2, 1935, to on or about March 28, 1946, the defendant in intervention, "Railroad Company," was in reorganization under Section 77 of the National Bankruptcy Act in that certain proceeding entitled "In the Matter of The Western Pacific Railroad Company, Debtor," No. 26591-S in the above-entitled court, the final order terminating said reorganization proceedings having been made and entered therein on March 28, 1946; that from on or about September 23, 1935, until on or about December 29, 1944, all the properties of said "Railroad Company" were held by the Reorganization Trustees appointed in said proceedings, and on or about December 29, 1944, pursuant to prior order of court the said Reorganization Trustees returned all its business, assets and properties to said reorganized "Railroad Company" and said defendant in intervention, to wit, said "Railroad Company," thereupon assumed all the obligations and liabilities of said Reorganization Trustees incurred by them in connection with said properties and proceedings and which had not been barred by said reorganization proceedings; that to the extent that the present action may involve any of such obligations or liabilities of said Reorganization Trustees so assumed by said defendant in intervention, "Railroad Company," or any funds or properties so transferred to said defendant in intervention by said Reorganization Trustees, it is an ac-

tion which is permitted by the reservations of jurisdiction in said reorganization proceedings and said order dated March 28, 1946.

IV.

Plaintiff in intervention, Russell M. Van Kirk, is the holder of 11,468 shares of the preferred stock of defendant in intervention, The Western Pacific Railroad Corporation, viz, the "Corporation," and has been a stockholder of said corporation at all times since August 13, 1942; that plaintiff in intervention Henry Offerman is the holder of 3,903 shares of the preferred stock of said defendant in intervention "Corporation" and has been a stockholder of said corporation at all times since July 7, 1942; that plaintiff in intervention, J. S. Farlee & Co., Inc., is the holder of 9,247 shares of the preferred stock of said defendant in intervention, "Corporation," and has been a stockholder of said corporation at all times since January 28, 1944; that plaintiffs in intervention, and each of them, were shareholders of said defendant in intervention, "Corporation," at the time of the transactions of which they complain herein.

V.

(a) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that at all the times herein mentioned the defendants in intervention, Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, The Standard Realty and Development Company and Delta Finance Co., Ltd., and each of

them, were, and now are, wholly owned subsidiaries of defendant in intervention, The Western Pacific Railroad Company, viz, the "Railroad Company." Said defendants in intervention are hereinafter referred to as the "Railroad Group."

(b) From approximately the year 1916 to on or about April 30, 1944, the defendant in intervention, "Corporation," was the owner and holder of all the outstanding stock of defendant in intervention, "Railroad Company"; that during said period of time the said "Corporation" was a holding company, the principal assets of which consisted of all the outstanding stock of said "Railroad Company," as aforesaid, and all the stock of defendant in intervention, The Western Realty Company, as well as stock of the Denver & Rio Grande Railroad Co., a corporation; that during said time, until approximately the year 1941, the defendant in intervention, "Corporation," was primarily engaged in controlling and providing financing by loans and otherwise to said defendant in intervention, "Railroad Company," and the latter's aforementioned subsidiaries, to wit, the defendants in intervention, "Railroad Group."

(c) From on or about August 2, 1935, to on or about March 28, 1946, the defendant in intervention, "Railroad Company," was in reorganization under Section 77 of the National Bankruptcy Act in that certain proceeding entitled, "In the Matter of The Western Pacific Railroad Company, Debtor," No. 26591-S in the above-entitled court, as aforesaid; that said defendant in intervention,

“Railroad Company,” was reorganized in said proceedings under a plan of reorganization filed by the Interstate Commerce Commission on or about June 21, 1939, in which proposed plan of reorganization the capital stock of said Debtor, “Railroad Company,” so owned and held by the defendant in intervention, “Corporation,” as aforesaid, was found by the Interstate Commerce Commission to be worthless and without equity or value; that said proposed plan of reorganization was affirmed by the Supreme Court of the United States on or about March 11, 1943, and was finally confirmed by the court in said reorganization proceedings on or about October 11, 1943; that in and by said plan of reorganization as finally confirmed on or about October 11, 1943, as aforesaid, it was found and determined that the stock of said defendant in intervention, “Railroad Company,” so owned and held by defendant in intervention, “Corporation,” being all the stock of said “Railroad Company,” was wholly worthless and without equity or value; that pursuant to said finding an agreement was made and entered into on or about November 24, 1943, dated as of November 22, 1943, by and between the defendant in intervention, The Western Pacific Railroad Corporation, viz, the “Corporation,” the hereinafter mentioned James Foundation of New York, Inc., and Frederick H. Ecker, Frank C. Wright and Robert E. Coulson as the Reorganization Committee of defendant in intervention, The Western Pacific Railroad Company, viz, the “Railroad Company,” and certain other parties, wherein

and whereby it was provided, among other things, that said worthless stock of the "Railroad Company" so owned and held by the "Corporation," as aforesaid, should be assigned, transferred and delivered by the "Corporation" to the Reorganization Committee of the "Railroad Company" upon request by the latter for the purposes of said reorganization plan and for ultimate cancellation thereunder; that plaintiffs in intervention are informed and believe and therefore allege the fact to be that said stock was in fact so transferred on or about April 30, 1944; that on or about December 29, 1944, pursuant to prior order of the court in said reorganization proceedings, the Reorganization Trustees therein returned to said defendant in intervention, "Railroad Company," all its business, assets and property, as aforesaid, and thereupon said plan of reorganization was consummated; that the effective date of said plan of reorganization was January 1, 1939.

VI.

(a) As of December 31, 1946, the said defendant in intervention, The Western Pacific Railroad Corporation, viz, the "Corporation," had outstanding 381,205 shares 6% preferred stock and 574,457 shares of common stock; that plaintiffs in intervention are informed and believe and therefore allege the fact to be that all of said preferred and common stock of said "Corporation" is still outstanding; that each share of said common and preferred stock is entitled to one vote and upon liquida-

tion of the corporation the preferred stock is entitled to the payment of \$100 per share plus accumulated dividends; that no dividends have been paid on said preferred stock since approximately the year 1927.

(b) As hereinbefore alleged the stock holdings of the defendant in intervention, "Corporation," in said defendant in intervention, "Railroad Company," were found to be worthless and without equity or value by the Interstate Commerce Commission on or about June 21, 1939, in the aforesaid plan for the reorganization of said "Railroad Company," which plan of reorganization was finally confirmed by the court in said reorganization proceedings on or about October 11, 1943; that likewise the aforesaid stock holdings of defendant in intervention, "Corporation," in the Denver & Rio Grande Railroad Co. were found to be worthless by the Interstate Commerce Commission in proceedings for the reorganization of that company, which finding was approved by the Supreme Court of the United States; that pursuant to the aforementioned agreement dated as of November 22, 1943, by and between said "Corporation" and said James Foundation of New York, Inc., and said Reorganization Committee of said "Railroad Company" and others, the aforesaid stock holdings of defendant in intervention, "Corporation," in defendant in intervention, The Western Realty Company, were transferred to said "Foundation" in purported satisfaction of an indebtedness of said "Corporation" to said "Foundation"; that the remaining assets

of said defendant in intervention, "Corporation," were negligible, and its outstanding common stock, to wit, said 574,457 shares, has had no financial worth or value since approximately the year 1941; that presently the prior claims of said outstanding preferred stock, to wit, said 381,205 shares, are in excess of the sum of \$50,000,000.

(c) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that since approximately the year 1941 the said defendant in intervention, "Corporation," has engaged in no business and has received only nominal income insufficient to cover its operating expenses; that no regular meetings of the stockholders of said "Corporation" have been held and no annual reports have been sent out to its stockholders by said "Corporation" since approximately said year 1941; that on or about April, 1943, the directors of said defendant in intervention, "Corporation," were in the process of liquidating said company; that on or about August 16, 1943, the securities of said "Corporation" were delisted from the New York Stock Exchange.

VII.

(a) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that continuously from about the year 1925 until his death in 1941 one Arthur Curtiss James directly and through companies known as A. C. James Co., Curtiss Southwestern Corporation and Curtiss Southwestern Company, the same being wholly

owned personal holding companies of the said James, owned 33,400 shares of the aforesaid outstanding preferred stock of said defendant in intervention, "Corporation," or approximately 8.8% of its total outstanding preferred stock, and 352,390 shares of the aforesaid outstanding common stock of said "Corporation" or approximately 61.5% of its total outstanding common stock; that the aforesaid stock holdings of the said James in said "Corporation" amounted to approximately 40% of its total outstanding voting stock, namely, the total outstanding preferred and common stock of said defendant in intervention, "Corporation"; that the balance of said outstanding stock of said "Corporation" was widely dispersed and held by numerous stockholders; that the said James directly and through his aforesaid personal holding companies, also owned a substantial amount of the secured bonds of said defendant in intervention, "Railroad Company," and was one of the dominant interests actively participating in the aforesaid proceedings for the reorganization of said "Railroad Company" and in addition the said personal holding companies of the said James held as collateral security for certain alleged loans to said defendant in intervention, "Corporation," the aggregate face amount of \$5,980,000 of First Mortgage 5% Gold Bonds, Series A, due 1946 of said The Western Pacific Railroad Company, viz, the "Railroad Company," which bonds were owned by said "Corporation" but for which the aforesaid James' interests acted in said

reorganization through the aforesaid Robert E. Coulson, one of the Reorganization Committee of said "Railroad Company."

(b) The said Arthur Curtiss James died in the year 1941 and thereupon, pursuant to the provisions of his last will and testament, the aforementioned James Foundation of New York, Inc., a New York Corporation (referred to herein as the "Foundation") was organized and said "Foundation" thereupon succeeded to and became the owner of all the above-mentioned assets of the said James and his said personal holding companies; that accordingly ever since approximately the year 1941 said "Foundation" has continuously been and now is the holder of said 33,400 shares of said preferred stock and said 352,390 shares of said common stock in said defendant in intervention, "Corporation," representing, as aforesaid, approximately 40% of its outstanding voting stock and resulting, so plaintiffs in intervention are informed and believe and therefore allege the fact to be, in the absolute control and domination of said defendant in intervention, "Corporation," by said "Foundation," the balance of the outstanding voting stock of said "Corporation" being widely dispersed and held by numerous stockholders, including, as to the balance of said preferred stock, these plaintiffs in intervention; that in succeeding to the aforesaid assets of the said James and his said personal holding companies, as aforesaid, said, the "Foundation" also received and became the owner of the above-mentioned secured bonds of defendant in intervention, "Railroad Com-

pany," and the above-mentioned collateral loan secured by said \$5,980,000 in face amount of first mortgage bonds of said "Railroad Company," which last mentioned bonds were owned as aforesaid by said "Corporation"; that the said "Foundation" continued to actively participate in the aforesaid reorganization of said defendant in intervention, "Railroad Company," through the said Robert E. Coulson and pursuant to the aforementioned agreement dated as of November 22, 1943, by and between said "Corporation" and said "Foundation" and said Reorganization Committee of said "Railroad Company" and others, said collateral, to wit, \$5,980,000 in face amount of First Mortgage 5% Gold Bonds, Series A, due 1946 of said "Railroad Company" was transferred together with other securities belonging to said "Corporation" to said "Foundation" in purported satisfaction of said collateral loan; that pursuant to the above-mentioned plan of reorganization of said defendant in intervention, "Railroad Company," which plan was finally confirmed by the court in said reorganization proceedings on or about October 11, 1943, as aforesaid, and as a result thereof, said "Foundation" by virtue of its above-described interests in said "Railroad Company" received new securities therein amounting to more than 25% of the outstanding stock of said reorganized "Railroad Company" and millions of dollars of its bonds; that as of April 22, 1946, said "Foundation" was the largest stockholder of said defendant in intervention, "Railroad Company," holding 55,727 shares out of a total of

318,502 outstanding shares of the preferred stock of said "Railroad Company" and 153,165 shares out of a total of 408,283 outstanding shares of its common stock; that plaintiffs in intervention are informed and believe and therefore allege the fact to be that said "Foundation" has held said stock and said new bonds continuously since the consummation of said plan of reorganization on or about December 29, 1944, as aforesaid, and does now hold the same and by virtue thereof has continuously dominated and controlled said defendant in intervention, "Railroad Company."

(c) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that by virtue of the aforesaid stock ownerships and control the said Arthur Curtiss James during his lifetime and the said James Foundation of New York, Inc., viz, the "Foundation," subsequent to his death, have at all the times herein mentioned continuously dominated and controlled the defendants in intervention, to wit, the "Corporation," the "Railroad Company," the "Railroad Group" and The Western Realty Company and have caused to be elected as officers and directors of said companies persons who acted in the interest and for the benefit of the aforesaid James' interests and failed to exercise their independent judgment on behalf of said companies and their stockholders in matters involving the personal interest of the said James and said "Foundation" to the detriment of said "Corporation" and its remaining stockholders; that said

“Foundation” has continuously since its organization in or about the year 1941 and does now dominate and control the defendant in intervention, “Corporation,” and has continued to elect officers and directors previously elected by the said James and others of its own choosing, certain of whom, as is more specifically hereinafter alleged, have directed and controlled the management of said “Corporation” and all of whom have acted as the agents of said “Foundation” and not independently for the best interests but to the detriment of said “Corporation” and its remaining stockholders; that specifically with respect to the transactions of which plaintiffs in intervention complain herein and which are hereinafter particularly alleged, the following persons acted and/or are now acting in the following capacities for said “Corporation” and said “Foundation” or said “Railroad Company,” to wit:

1. The said Robert E. Coulson and one William W. Carman have been officers and trustees of said James Foundation of New York, Inc., viz, the “Foundation” continuously since its organization and now are officers and trustees thereof; that both the said Coulson and Carman have acted on behalf of the said Arthur Curtiss James and said “Foundation” as officers, directors or employees of said defendants in intervention, “Corporation,” and/or “Railroad Company”; that the said Coulson was a director of said “Corporation” from prior to the year 1941 to on or about February 19, 1942, and was also a member of the Reorganization Commit-

tee of said "Railroad Company" during said reorganization proceedings and as such was one of the signatories to the aforementioned agreement dated as of November 22, 1943; that ever since said reorganization the said Coulson has been and now is a director of said defendant in intervention, "Railroad Company"; that at all the times herein mentioned the said Coulson has been and now is a partner in the firm of Messrs. Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York City, which firm appears in the present action as attorneys for defendant in intervention, The Western Realty Company, which is now a wholly owned subsidiary of said "Foundation"; that said Messrs. Whitman, Ransom, Coulson & Goetz and the said Coulson have been at all the times herein mentioned and now are the attorneys for said "Foundation"; that said firm and the said Coulson were retained by the Reorganization Trustees in the aforesaid reorganization of defendant in intervention "Railroad Company" as tax counsel for said "Railroad Company" and its subsidiaries and as such handled all matters pertaining to the hereinafter mentioned transactions which are complained of herein; that with respect to said transactions the officers and directors of said defendant in intervention "Corporation" failed and refused to retain independent tax counsel for said "Corporation" and accepted and relied upon the advice of said Messrs. Whitman, Ransom, Coulson & Goetz as to the rights of said "Corporation" with full knowledge that said firm represented said "Railroad Company" and its

subsidiaries and was being compensated thereby; that as is hereinbefore alleged the said William W. Carman has at all times been and now is a trustee and an officer, to wit, president, of said "Foundation" and the said Carman executed the aforementioned agreement dated as of November 22, 1943, on behalf of said "Foundation" as its president; that the said Carman was likewise a director of said defendant in intervention "Corporation" from prior to the year 1941 to and including the year 1944.

2. Continuously since approximately the year 1941 one Michael J. Curry has been and now is an officer and director of said defendant in intervention, "Corporation"; that the said Curry was formerly secretary and treasurer of said "Corporation" and since some time during the year 1943 has been and now is its president; that the said Curry executed the aforementioned agreement dated as of November 22, 1943, on behalf of said "Corporation" as its president; that at all the times herein mentioned the said Curry has also been and now is an employee of said defendant in intervention "Railroad Company" being employed by it in connection with tax matters through arrangement made with said "Railroad Company" by the said Robert E. Coulson on behalf of his said law firm.

3. Continuously since the year 1945 one Mary C. Valouch has been and now is a director and officer, to wit, vice president and secretary, of said defendant in intervention "Corporation"; that during said time the said Mary C. Valouch has been and now is an employee in the office of said tax counsel for said defendant in intervention "Railroad Company."

4. Continuously since prior to the year 1941 one Thomas M. Schumacher has been and now is a director of said defendant in intervention "Corporation" and was president thereof from some time prior to the year 1941 until succeeded by the said Michael J. Curry in the year 1943, as aforesaid; that the said Schumacher was likewise one of the Reorganization Trustees in the aforesaid reorganization of said defendant in intervention "Railroad Company" from on or about September 23, 1935, to on or about December 29, 1944.

5. During all the times herein referred to Messrs. Pierce & Greer of New York were general counsel for both said defendants in intervention "Corporation" and "Railroad Company."

(d) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that in addition to the above-mentioned persons certain other directors of defendant in intervention "Corporation" were at all the times herein mentioned and now are, employees of said "Foundation" or said defendant in intervention "Railroad Company," directly or indirectly, with the result that the offi-

cers and board of directors of said "Corporation" were and now are completely dominated and controlled by said "Foundation" and said "Railroad Company"; that all compensation received by said last-mentioned persons and said above-named persons and counsel have been paid and is now being paid directly or indirectly by said "Foundation" or said "Railroad Company."

VIII.

(a) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that during the years 1942, 1943 and 1944 the said defendant in intervention "Railroad Company" through its Reorganization Trustees and its aforesaid tax counsel and the officers and directors of said defendant in intervention "Corporation" and the aforesaid officers and trustees of said "Foundation" conceived a plan to confer upon said "Railroad Company" and its subsidiaries a federal income and excess profits tax saving in the approximate total amount of \$14,301,821.54 without any benefit or consideration whatsoever to said "Corporation" by (1) causing said defendant in intervention "Corporation" to file consolidated income and excess profits tax returns for the years 1942, 1943 and 1944 for all the defendants in intervention herein as the parent corporation of an affiliated group of corporations within the meaning of Section 141 of the Internal Revenue Code at a time when said defendant in intervention "Corpora-

tion" had been stripped of its aforesaid holdings in said "Railroad Company" and had no duty or obligation whatsoever so to do; and by (2) including in said consolidated returns the aforesaid capital losses of said "Corporation" consisting chiefly of the aforesaid loss of stock holdings in said "Railroad Company" thereby reducing to zero the tax bill of said "Railroad Company" and its subsidiaries; that pursuant to said plan said defendant in intervention "Corporation" was caused to file on or about July 15, 1944, such consolidated return for the year 1943 wherein losses were reported as having been incurred in said year 1943 and as deductible on behalf of said group, which losses consisted chiefly of the aforesaid capital loss of defendant in intervention "Corporation" resulting from the aforesaid finding in said plan of reorganization finally confirmed by the court in said reorganization proceedings on or about October 11, 1943, as aforesaid, that its aforementioned stock in said defendant in intervention "Railroad Company" was wholly worthless and without equity or value; that the aforesaid use of said loss on a consolidated basis resulted in the elimination of all taxable income for said defendant in intervention "Railroad Company" and its subsidiaries for the year 1943 and also provided unused credit balances to carry back to the year 1942 and to carry forward to the year 1944 sufficient to eliminate all taxable income for 1942 and the first four months of 1944; that said defendant in inter-

vention "Railroad Company" and its subsidiaries were thereby saved approximately the sum of \$7,100,000 in income and excess profits taxes which would have otherwise been payable by them for the year 1943; that based upon the aforementioned carry back of the unused credit balance of said loss to the year 1942 the said defendant in intervention "Corporation" was caused to file with the Federal Collector of Internal Revenue in the Second District of New York on or about March 9, 1945, a claim for refund in the sum of \$4,201,821.54 theretofore paid by the Reorganization Trustees of said "Railroad Company" as income and excess profits taxes for the year 1942, together with interest thereon, substantially all of which sum represents income and excess profits taxes payable by said defendant in intervention "Railroad Company" on its income and profits for the year 1942; that based upon the aforesaid carry forward of the unused credit balance of said loss to the year 1944 said defendant in intervention "Corporation" was caused to file in the year 1945 such consolidated income and excess profits tax return for the year 1944 and included therein the income of defendant in intervention "Railroad Company" and its subsidiaries for the first four months of 1944, to wit, the period January 1st to April 30, 1944; that thereby said defendant in intervention, "Railroad Company," and its subsidiaries were saved an additional sum of approximately \$3,000,000 in income and excess profits taxes which would have other-

wise been payable by them for the first four months of 1944.

(b) Said consolidated tax returns for the years 1943 and 1944 and said refund claim for the year 1942 were so filed after the aforesaid final adjudication on or about October 11, 1943, by the Court in said reorganization proceeding that said "Corporation's" stock holdings in said, "Railroad Company," were wholly worthless and without equity or value as found by the Interstate Commerce Commission on or about June 21, 1939, and affirmed by the Supreme Court of the United States on or about March 11, 1943, as aforesaid, and after the transfers of the properties belonging to said "Corporation" which were provided for in said agreement dated as of November 22, 1943, as aforesaid; that the date established in said returns as the date of severance of the affiliation of said defendants in intervention within the meaning of said Section 141 of the Internal Revenue Code was April 30, 1944, which, so plaintiffs are informed and believe and therefore allege the fact to be, was the date as of which said "Corporation's" said stock in said "Railroad Company" was transferred to the Reorganization Committee of said "Railroad Company" pursuant to said agreement of November 22, 1943; that said defendant in intervention "Corporation" had no taxable earnings or income or profits for the years 1942, 1943 or 1944, and no federal income or excess profits taxes were payable by it; that under the provisions of the Internal

Revenue Code and the rules and regulations promulgated thereunder said defendant in intervention "Corporation" was not obligated to file such consolidated returns for the years 1942, 1943 or 1944, but was entitled to elect to file separate returns solely in its own behalf reporting its said losses for its own possible future benefit and having lost all its aforesaid interests in said "Railroad Company" said "Corporation" was under no obligation whatsoever to said "Railroad Company" and its subsidiaries, or any thereof, legal, moral, financial or otherwise, to file said consolidated returns and refund claim and thus enable said defendants in intervention to effect a tax saving in excess of \$14,300,000 for themselves without any benefit or consideration whatsoever to said defendant in intervention "Corporation."

(c) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that the above-mentioned transactions, to wit, the filing of said consolidated tax returns and said refund claim on the basis of the aforesaid capital loss suffered by defendant in intervention "Corporation," as aforesaid, were accomplished by said defendant in intervention "Railroad Company" and its Reorganization Trustees and aforesaid tax counsel and said "Foundation" through the above-named persons and others who occupied fiduciary and controlling positions in said "Corporation" and similar positions with respect to said "Railroad Company" or "Foundation" and whose interests were best

subverted by favoring said "Railroad Company" and consequently said "Foundation" through its aforesaid holdings therein, at the expense of said "Corporation" and which persons were and still are dominated and controlled by said "Foundation" and said "Railroad Company"; that the interests of said defendant in intervention "Corporation" and its stockholders other than said "Foundation" were not represented by independent officers, directors or counsel; that by virtue of its aforesaid valuable and dominating interests in said defendant in intervention "Railroad Company" as compared with its aforesaid stock holdings in the inactive and impecunious "Corporation" it was and is greatly to the financial interest and advantage of said "Foundation" to have the aforementioned tax savings accrue to said "Railroad Company" and its subsidiaries and to deprive the said "Corporation" thereof; that the said transactions were unfair and inequitable to said defendant in intervention "Corporation" in that (1) said "Corporation" was thereby caused to cede to said defendant in intervention "Railroad Company" and its subsidiaries the right to utilize the capital losses of said "Corporation" the use of which resulted in tax savings including said refund claim in excess of \$14,300,000 for said "Railroad Company" and its subsidiaries for which said "Corporation" has to date received no benefit or consideration whatsoever, and (2) said transactions were in violation of recognized and good accounting practice in such

situations under which said "Corporation" should receive the amount of said tax savings from said "Railroad Company" and its subsidiaries and the proceeds of said refund claim when paid by the government as partial offsets against its said capital losses; that the officers and directors of said "Corporation" equitably and pursuant to recognized and good accounting practice and in the proper exercise of their fiduciary duty to all the stockholders thereof should have demanded and obtained for said "Corporation" through prior arrangement with the remaining defendants in intervention, said tax savings and refund claim or a fair and proper proportion thereof for the aforesaid use of said capital losses and as partial offsets against the same.

(d) No final action has as yet been taken by the government on said claim for refund for the year 1942 in the aforesaid amount of \$4,201,821.54 and interest filed as aforesaid on or about March 9, 1945, and plaintiffs in intervention are informed and believe and therefore allege the fact to be that said consolidated tax returns for the years 1943 and 1944, to wit, said tax savings of approximately \$7,100,000 and \$3,000,000, respectively, have not as yet been finally audited and allowed by the government; that favorable action on said claim for refund will result in payment by the United States Government to said defendant in intervention "Corporation" as such parent corporation of said sum of \$4,201,821.54, together with interest, and favorable action in the final audit of said consolidated returns

for the years 1943 and 1944 will result in a total tax saving to defendant in intervention "Railroad Company" and its subsidiaries of approximately \$10,100,000 for which a reserve fund has been established by said defendant in intervention "Railroad Company" in said amount; that said defendant in intervention "Railroad Company" claims the whole of said refund claim and all proceeds therefrom and said tax savings to the prejudice of said "Corporation" and its stockholders.

IX.

(a) On or about June 27, 1946 plaintiffs in intervention herein Russell M. Van Kirk and Henry Offerman commenced a stockholders action in the United States District Court for the Southern District of New York, No. Civ. 36-584 therein, against the said Robert E. Coulson, William W. Carman, Michael J. Curry, Thomas M. Schumacher and Mary C. Valouch and certain other individuals and said James Foundation of New York, Inc., viz, the "Foundation," The Western Pacific Railroad Company, viz, the "Railroad Company" and The Western Pacific Railroad Corporation, viz, the "Corporation" as defendants, which action is still pending undetermined in said court; that in said action said plaintiffs in intervention are presently attacking the aforementioned agreement dated as of November 22, 1943, between said "Corporation," said "Foundation" and the Reorganization Committee of said "Railroad Company" and others pursuant

to which, among other things, said \$5,980,000 in face amount of first mortgage bonds of said "Railroad Company" and all the outstanding stock in said, The Western Realty Company, all of which securities were owned by defendant in intervention "Corporation," were transferred to said "Foundation," as aforesaid, and in which said action said plaintiffs in intervention seek, among other things, to recover said securities or the value thereof and also seek to recover said above-mentioned tax savings and refund claim in the approximate total amount of \$14,301,821.54,* as aforesaid, in the right of said "Corporation" and for the benefit of its stockholders; that in said action the aforesaid firm of Messrs. Whitman, Ransom, Coulson & Goetz appear as the attorneys for the defendants therein, Robert E. Coulson and said "Foundation" and said Messrs. Pierce & Greer appear as the attorneys for the defendant therein "Corporation" and others that defendant in intervention herein "Railroad Company" is not subject to the jurisdiction of the court in said action and has not appeared therein although named as a defendant, as aforesaid; that on or about September 24, 1946, motions to dismiss said action by the defendants Coulson and James Foundation of New York, Inc., therein were denied by the court; that thereupon, to wit, on or about October 10, 1946, the defendant in intervention herein, The Western Pacific Railroad Corporation, viz, the "Corporation," being also a defendant in said New York action, was caused by its aforesaid

officers, directors and counsel to file the present action in this court, to wit, No. 26508-G, herein with respect to said tax savings and refund claim which are also involved, as aforesaid, in said New York action; that plaintiffs in intervention are informed and believe and therefore allege the fact to be that at no time prior to the filing of the present action in this court, on or about October 10, 1946, as aforesaid, did the present officers or directors of said "Corporation" ever assert any claim whatsoever on its behalf to said tax savings or refund claim or any thereof, but on the contrary the said officers and directors of said defendant in intervention "Corporation" with full knowledge of all the facts which are hereinbefore alleged and being dominated and controlled by and acting for the benefit of said "Foundation" and said "Railroad Company" to the detriment of said "Corporation," as aforesaid, have conceded the aforesaid claim of said "Railroad Company" to said tax savings and refund claim; that plaintiffs in intervention are further informed and believe and therefore allege the fact to be that the present action filed in this court by said defendant in intervention "Corporation" on or about October 10, 1946, as aforesaid, was commenced by the present officers and directors of said "Corporation" in the interest of said "Foundation" and "Railroad Company" and by virtue of the domination and control of said officers and directors by said "Foundation" and "Railroad Company" for the purpose of obtaining

an adjudication in this court on said tax savings and refund claim without allegation or proof of the facts which are hereinbefore alleged with respect to the domination and control of said "Corporation" by said "Foundation" and "Railroad Company" and the respective interests and situations of said companies at the time of said transactions, which adjudication if favorable to said "Railroad Company" and its subsidiaries might constitute a bar to the relief sought in this respect by said plaintiffs in intervention in said New York action; that A. Perry Osborn, Esq., 20 Exchange Place, New York, who appears of counsel for said defendant in intervention "Corporation" in the present action, is one of the present directors of said "Corporation"; that said defendant in intervention "Railroad Company" and its subsidiaries, said "Foundation" and its aforesaid officers and trustees and the present officers, directors and counsel for said "Corporation," and each of them, have at all the times herein mentioned had and do now have knowledge or notice of all the facts which are hereinbefore alleged.

(b) Plaintiffs in intervention have not requested said defendant in intervention "Corporation" or its present officers or directors to bring action against the remaining defendants in intervention herein with respect to the subject matter of this action in intervention for the reason that the aforesaid officers and directors who presently control said "Corporation" participated in the wrongs

which are complained of herein and are themselves dominated and controlled by said "Foundation" and "Railroad Company"; that any demand upon said defendant in intervention "Corporation" or its present officers and directors to seek redress of the wrongs complained of herein would in effect have been a demand that they disclose their own failure to perform their duties and to act independently for said "Corporation" and its stockholders and would have been futile; that by reason of the foregoing facts the representation herein of the interest of plaintiffs in intervention by the present officers, directors and counsel for defendant in intervention "Corporation" is wholly inadequate; that plaintiffs in intervention have no adequate remedy at law.

And for a second cause of action, plaintiffs in intervention allege:

I.

Plaintiffs in intervention refer to Paragraphs I to IX inclusive of their first cause of action herein and by such reference incorporate the same in this their second cause of action.

II.

As hereinbefore alleged there was pending in the above-entitled court from on or about August 2, 1935, to on or about March 28, 1946, that certain reorganization proceeding under Section 77 of the National Bankruptcy Act entitled "In the Matter

of The Western Pacific Railroad Company, Debtor," No. 26591-S, in said court; that on or about March 28, 1946, an order was made and entered by the court finally terminating said reorganization proceedings and containing certain reservations of jurisdiction and restraining orders, which final order is of record in the files of this court; that by virtue of all the facts which are hereinbefore alleged, plaintiffs in intervention request either (a) an adjudication herein that said final order of March 28, 1946, does not restrain or prevent the prosecution of the cause of action which is herein alleged, or (b) a modification of said order so as to permit the prosecution of said cause of action and the claims which are asserted herein; that jurisdiction therefor is based upon the bankruptcy jurisdiction of this court in the aforesaid reorganization proceeding.

Wherefore, plaintiffs in intervention pray for the order, judgment and decree of this Honorable Court as follows, to wit:

(a) Ordering and directing said defendant in intervention, The Western Pacific Railroad Company, viz, the "Railroad Company" and its said subsidiaries and defendant in intervention, The Western Realty Company, to account to defendant in intervention, The Western Pacific Railroad Corporation, viz, the "Corporation" for the aforesaid total tax savings for the years 1942, 1943 and 1944 amounting, as aforesaid, including said claim for refund, to the approximate total sum of \$14,301,-

821.54, together with interest thereon at the legal rate;

(b) Ordering and directing said defendant in intervention "Railroad Company" to immediately pay over to said defendant in intervention "Corporation" said tax savings of said "Railroad Company" and its subsidiaries, for the years 1943 and 1944 amounting, as aforesaid, to the approximate sum of \$10,100,000, together with interest thereon, at such time or times as said tax savings, or any thereof, are finally audited and allowed by the proper tax authorities of the United States Government;

(c) Declaring and determining that said defendant in intervention, The Western Pacific Railroad Corporation, viz, the "Corporation" is the sole owner of and is exclusively entitled to said refund claim respecting said tax saving for the year 1942 and all sums refundable thereunder amounting, as aforesaid, to the sum of \$4,201,821.54, together with interest thereon, and quieting the right and title of said defendant in intervention "Corporation" therein and thereto against the claims of defendant in intervention "Railroad Company" and all other parties to this action, and declaring that said defendant in intervention "Corporation" is entitled to retain as against all other defendants in intervention herein any and all proceeds from said refund claim for its own use and benefit;

(d) Either declaring and determining that said final order of March 28, 1946, in said reorganization

proceeding, No. 26591-S, herein, does not restrain or prevent the prosecution of the claims which are herein made on behalf of said defendant in intervention "Corporation" to said tax savings and refund claim, or modifying said order of March 28, 1946, so as to permit the prosecution of said claims;

(e) Requiring said defendants in intervention to pay to plaintiffs in intervention their reasonable expenses incident to the prosecution of this action, including reasonable counsel fees, and

(f) For such other and further relief as to this Honorable Court may seem meet and equitable in the premises.

Dated: March 10, 1947.

ROGER AND CLARK,

/s/ WEBSTER CLARK,

/s/ DAVID FRIEDENRICH,

Attorneys for Plaintiffs in Intervention Russell M. Van Kirk, Henry Offerman and J. S. Farlee & Co., Inc., a corporation.

Of counsel:

POMERANTZ, LEVY, SCHREIBER
& HAUDEK.

State of California,
City and County of San Francisco—ss.

Webster V. Clark, being first duly sworn, deposes and says:

That he is an attorney at law duly licensed and admitted to practice before all the courts of the State of California and the above-entitled court; that he is a member of the firm of Rogers and Clark, with offices at 111 Sutter Building, San Francisco, California, attorneys for plaintiffs in intervention in the above-entitled action; that the facts in the above entitled action are within the personal knowledge of affiant; that he has read the foregoing Complaint in Intervention and knows the contents thereof and the same is true of his own knowledge except as to those matters which are therein stated on information or belief and as to those matters that he believes it to be true; that the said plaintiffs in intervention are absent from the City and County of San Francisco where their said attorneys have their offices and for that reason affiant makes this verification on their behalf.

/s/ WEBSTER CLARK.

Subscribed and sworn to before me this 11th day of March, 1947.

[Seal] /s/ MARION CURTIS,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires August 12, 1949.

[Endorsed]: Filed April 7, 1947.

[Title of District Court and Cause.]

ANSWER OF THE WESTERN PACIFIC
RAILROAD CORPORATION TO COM-
PLAINT IN INTERVENTION

The Western Pacific Railroad Corporation, plaintiff herein, for its Answer to the Complaint in Intervention filed by Russell M. Van Kirk, Henry Offerman and J. S. Farlee & Co., Inc., a corporation, respectfully shows and alleges as follows, to wit:

The plaintiff denies on its own behalf and on behalf of its officers and directors all allegations of the Complaint in Intervention of domination and control of the plaintiff, its officers and directors, by the James Foundation of New York, Inc., and The Western Pacific Railroad Company or any one or more of the subsidiaries or affiliates of either; as to all other allegations of the Complaint in Intervention plaintiff puts the plaintiffs in intervention to the proof thereof, and submits to the determination of the Court thereon.

Plaintiff alleges that it instituted and is prosecuting in the interest of its own stockholders the action set forth in the Bill of Complaint herein; it admits that said Railroad Company is wrongfully interposing as a defense to the cause of action alleged in the Bill of Complaint herein the Order of the Bankruptcy Court dated March 28, 1946, and avers that said Order does not restrain or prevent the prosecution of the cause of action as alleged in

the Bill of Complaint. Plaintiff submits that if said order be interpreted to bar the prosecution of the plaintiff's cause of action such interpretation is contrary to the true intent of the Court and that the Order should be modified so as to accurately express the intent of the Court and to permit the prosecution of said cause of action and the claims asserted by the plaintiff in its Bill of Complaint herein.

Wherefore, the plaintiff prays that plaintiff in intervention shall be required to proceed herein in subordination to the plaintiff and to the cause of action alleged by the plaintiff in its Bill of Complaint herein; and that Leroy R. Goodrich, attorney for the plaintiff, shall be designated as General Counsel to receive service of pleadings and other documents in this action; and that all papers shall issue out of or be served upon the office of such General Counsel, provided, however, that all papers served upon General Counsel for plaintiff shall include additional copies for transmission to Rogers and Clark, Webster V. Clark and David Freidenrich, attorneys for the plaintiffs in intervention.

THE WESTERN PACIFIC
RAILROAD CORPORATION,

By /s/ LEROY R. GOODRICH,
Its Attorney.

Of Counsel:

FRANK C. NICODEMUS, JR.,
A. PERRY OSBORN.

[Endorsed] Filed June 30, 1947.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE WESTERN
REALTY COMPANY TO COMPLAINT IN
INTERVENTION

Comes now the defendant in intervention, The Western Realty Company, and answering the complaint in intervention herein, respectfully shows and alleges upon information and belief:

As to the First alleged cause of action:

1. Denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in Paragraphs I, IV and IX of said complaint.

2. Denies each and every allegation contained in Paragraph II of said complaint, except that said defendant admits that it is a Colorado corporation; that the defendant The Western Pacific Railroad Corporation is a Delaware corporation; that the defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway, The Standard Realty and Development Company, and Delta Finance Co., Ltd., are California corporations, and that Deep Creek Railroad Company was formerly a Utah corporation and was dissolved prior to the commencement of this action.

3. Denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in subdivisions (a) and (b) of Paragraph III of said complaint, ex-

cept that said defendant admits that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000, and that the defendant, The Western Pacific Railroad Company was reorganized under section 77 of the National Bankruptcy Act in the proceeding in this court entitled "In the Matter of The Western Pacific Railroad Company, Debtor" (No. 26591-S).

4. Denies each and every allegation contained in subdivision (a) of Paragraph V of said complaint, except that said defendant admits that the defendants Sacramento Northern Railway and The Standard Realty and Development Company were and are wholly owned subsidiaries of the defendant, The Western Pacific Railroad Company; and denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in subdivisions (b) and (c) of Paragraph V of said complaint, except that said defendant admits that, from on or about June 4, 1920, to on or about May 15, 1944, all of its outstanding stock was held by the defendant, The Western Pacific Railroad Corporation; that the defendant, The Western Pacific Railroad Company, was reorganized under section 77 of the National Bankruptcy Act in the proceeding in this court entitled "In the Matter of The Western Pacific Railroad Company, Debtor" (No. 26591-S), and that the unsecured debts and capital stock of the defendant, The Western Pacific Railroad Company, were found to be without equity or value in said proceeding, which finding was ultimately sustained

by the Supreme Court of the United States on or about March 15, 1943.

5. Denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in subdivisions (a), (b) and (c) of Paragraph VI of said complaint, except that said defendant admits that the unsecured debts and capital stock of the defendant, The Western Pacific Railroad Company, were found to be without equity or value in the reorganization proceeding of the defendant, The Western Pacific Railroad Company, as aforesaid, and that on or about May 15, 1944, all of the outstanding stock of said defendant, The Western Realty Company, held by the defendant, The Western Pacific Railroad Company, was transferred to the James Foundation of New York, Inc.

6. Denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in subdivisions (a), (b), (c) and (d) of Paragraph VII of said complaint, except that said defendant admits that all of its outstanding stock has been held by James Foundation of New York, Inc., since on or about May 15, 1944; that Robert E. Coulson is a partner in the firm of Messrs. Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York, N. Y., which firm appears in this action as attorneys for said defendant, and that Michael J. Curry was formerly an officer of the defendant, The Western Pacific Railroad Corporation.

7. Denies each and every allegation contained in subdivision (a) of Paragraph VIII of said complaint, except that said defendant admits that, during the years 1942 and 1943 and the first four calendar months of 1944, the defendants in intervention constituted an affiliated group of corporations within the meaning of the Internal Revenue Code and income and excess profits tax returns were filed on a consolidated basis by the defendant, The Western Pacific Railroad Corporation on behalf of said affiliated group of corporations; that the consolidated returns for the year 1942 reported income and excess profits tax in the amount of \$4,201,821.54, the whole of which sum was paid in 1943 with funds supplied by the reorganization trustees of the defendant, The Western Pacific Railroad Company; that the consolidated returns for the year 1943 and the first four months of 1944 reported no taxable income, and that the defendant, The Western Pacific Railroad Corporation, filed in 1945 a claim for refund of said sum of \$4,201,821.54 theretofore paid as income and excess profits tax for the year 1942, together with interest thereon; and denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in subdivisions (b), (c) and (d) of Paragraph VIII of said complaint, except that said defendant admits that the consolidated tax returns for the year 1943 and the first four calendar months of 1944 were filed on or about July 15, 1944, and June 15, 1945, respectively, and that the claim for refund of the amount paid as

income and excess profits tax for the year 1942, as aforesaid, was filed on or about March 9, 1945.

As to the Second alleged cause of action:

1. Denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation and reallegation contained in the second alleged cause of action set forth in said complaint, except as hereinabove otherwise specifically denied or admitted.

For a complete defense to the First and Second alleged causes of action:

1. The complaint in intervention fails to state a claim against the defendant, The Western Realty Company, upon which relief can be granted.

Wherefore, the defendant, The Western Realty Company, demands judgment that the complaint in intervention herein be dismissed as to said defendant, together with the costs and disbursements of this action.

PILLSBURY, MADISON
& SUTRO,

/s/ FELIX T. SMITH,
/s/ EVERETT A. MATHEWS,

WHITMAN, RANSOM,
COULSON & GOETZ,

Attorneys for Defendant, The Western Realty Company.

Receipt of copy attached.

[Endorsed]: Filed July 1, 1947.

[Title of District Court and Cause.]

ORDER DENYING APPLICATION FOR TEMPORARY RESTRAINING ORDER ON CONDITION, AND PRETRIAL ORDER

The application of interveners above named for a temporary restraining order enjoining and restraining the plaintiff and the defendants and each of them from consummating the settlement of tax liability to and refund claim against the United States, having come on before the court in open court in the courtroom of the above-entitled court in the Post Office Building, San Francisco, California, on Monday, the 25th day of August, 1947, the interveners appearing by Webster V. Clark, Esq., and David Freidenrich, Esq., and by Julius Levy, Esq., of the New York Bar, specially admitted for the purpose of presenting the motion of the interveners, and the plaintiff appearing by its attorney, Leroy R. Goodrich, Esq., and the defendant, Western Realty Company, appearing by its attorney, Everett Mathews, Esq., and the other defendants appearing by their attorneys, Messrs. Allan P. Matthew and James D. Adams, and the said interveners having filed the affidavit of Julius Levy in support of said application and proposed forms of temporary restraining order and order to show cause, and of temporary injunction, and the defendants having presented to the Court a form of stipulation between plaintiff and the defendants, in the form annexed to this order and marked

Exhibit A, and the said application having been presented by the interveners and opposed by the defendants on Monday, August 25, 1947, and on Tuesday, August 26, 1947, all parties being represented by their aforesaid counsel during the entirety of said hearing on both of said dates, and the court having considered the same; and

Said hearing having developed and clarified certain issues and contentions of the parties concerning the effect of the aforesaid settlement, as follows:

(a) Plaintiffs in Intervention having contended that, as set forth in the aforesaid affidavit of Julius Levy, the form of said proposed settlement will prejudice the cause of plaintiff and plaintiffs in intervention herein by subjecting that part thereof involving said claim for refund to certain technical defenses and other parts thereof to substantive disadvantages—all of which plaintiffs in intervention contend would not be otherwise applicable, and

(b) Plaintiff Corporation having contended that, by virtue of a stipulation to be entered into between said plaintiff and defendants, said settlement will merely reduce pro tanto the amount of the claim in litigation herein and will not subject any part of said claim either to any technical defenses or to any substantive disadvantages which would not have otherwise been applicable and will not prejudice or enhance the pre-existing rights or remedies of any party at the expense of any other; and

(c) Defendants (other than The Western Realty

Company) having contended that by virtue of said stipulation the settlement with the Government was made without prejudice to the respective claims and defenses of the parties to the litigation except that all those claims and defenses should be deemed to relate to a tax saving as reduced by settlement with the Government and that the claim for refund should be deemed to have been allowed in proportion which it bears to the total tax saving, and that the tax saving for the subsequent years should be deemed to have been reduced in like proportion and that the defenses of the parties should not be imperiled, waived or prejudiced nor should the claims be imperiled, waived or prejudiced except as all thereof relate to a fixed or determinable amount of tax saving in consequence of the settlement with the Government;

Now, Therefore, upon filing and considering the aforesaid affidavit of Julius Levy, the aforesaid proposed stipulation (Exhibit A), the minutes of the hearing herein and all of the papers and prior proceedings,

It is Hereby Ordered:

(1) That the application of interveners for a restraining order be and the same is hereby denied upon the condition that the defendants shall enter into a stipulation with the plaintiff in the form annexed hereto marked Exhibit A; and upon the further condition that said hearing upon said application of interveners shall be deemed a pretrial

hearing on the aforesaid issues as if properly noticed as such so that the Court may make and enter an appropriate pretrial order pursuant thereto; and

(2) That the aforesaid settlement with the United States Government shall have force and effect in this action and as between the parties hereto solely to the extent that it reduces pro tanto the total amount in controversy herein and that in all other respects this Court shall and does hereby preserve the respective rights and positions of all parties and shall determine the issues and give judgment herein, in the same manner as if said tax saving had been allowed and said refund claim allowed and paid by the United States Government in the ordinary course and manner prescribed by law and as proportionately reduced by said settlement.

Dated: August 29, 1947.

/s/ LOUIS E. GOODMAN,
District Judge.

Approved as to Form:

LEROY R. GOODRICH,
FRANK C. NICODEMUS, JR.,
A. PERRY OSBORN,

By /s/ LEROY R. GOODRICH,
Attorneys for Plaintiff.

ROGERS & CLARK,
WEBSTER V. CLARK,
DAVID FREIDENRICH,

POMERANTZ, LEVY,
SCHREIBER & HAUDEK,
JULIUS LEVY,

By /s/ WEBSTER V. CLARK,

Attorneys for Plaintiffs in
Intervention.

ALLAN P. MATTHEW,
JAMES D. ADAMS,
ROBERT L. LIPMAN,
BURNHAM ENERSEN,
McCUTCHEN, THOMAS,
MATTHEW, GRIFFITHS
& GREENE,

By /s/ JAMES D. ADAMS,

Attorneys for Defendants Other Than The Western
Realty Company.

[Endorsed]: Filed August 29, 1947.

[Exhibit A attached to the preceding Order is identical to the Stipulation and Agreement between plaintiff and defendants relating to agreement with the Bureau of Internal Revenue. See pages 168 to 175 inclusive.]

[Title of District Court and Cause.]

STIPULATION AND AGREEMENT BETWEEN PLAINTIFF AND DEFENDANTS RELATING TO AGREEMENT WITH THE BUREAU OF INTERNAL REVENUE

1. The Bureau of Internal Revenue has accepted a proposal for the settlement of corporation income and excess profits tax liability on behalf of the parties hereto, copies of which said proposal and acceptances are annexed hereto marked Exhibit A.

2. It is stipulated and agreed as follows:

(a) That the approval and acceptance of such settlement by the plaintiff and the defendants shall be without prejudice to the interests, claims or defenses asserted by the parties hereto, respectively, in the subject matter of this action and without prejudice to the position of the said parties inter se with respect thereto, and that all the interests and claims asserted by the said parties are to be determined with relation to, and as limited to, the net amount of alleged tax saving involved in this action as diminished by the settlement.

(b) More particularly, the claim for refund

of taxes paid for the year 1942 shall not be deemed to have been abandoned by said settlement, but on the contrary said refund claim shall be deemed to have been diminished in the proportion in which the aggregate of the tax savings involved in this action shall have been diminished by the settlement, and as so diminished to have been allowed, paid to the plaintiff as the agent for the affiliated group designated in Regulations 104 and 110, and by the plaintiff paid into court, and the tax savings for the year 1943 and for the first four months of 1944 shall be deemed to have been diminished in like proportion. Nothing herein contained shall obligate any party hereto to make any deposit or payment into court.

(c) By acquiescence in such settlement none of the parties hereto waives any of its interests, claims or defenses in the above-entitled action, as against any other party, but all such interests, claims and defenses shall relate to the amount of tax savings as diminished by said settlement, and all parties stipulate and agree that the aggregate amount of the tax savings involved in or claimed in said action has been diminished by said settlement by the amount of \$4,201,821.54.

(d) Nothing herein contained shall be deemed to be or constitute a recognition or admission on the part of any party of the validity, merit or equity of the claims of any other party to said tax savings as reduced, or to any part thereof, or a waiver, surrender, or relinquishment in any manner

or to any extent of the defenses or any thereof of any party to the claims of any other party in and to such tax savings, as reduced.

(e) In the event the said tax liabilities of the parties hereto shall not be finally settled in accordance with said agreement with the Bureau of Internal Revenue, this stipulation shall be of no force or effect whatsoever, and all the parties shall be released herefrom with like effect as if this stipulation had never been made.

Dated September 3, 1947.

/s/ LEROY R. GOODRICH,

/s/ F. C. NICODEMUS, JR.,

Attorneys for Plaintiff, The Western Pacific Railroad Corporation.

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ ROBERT L. LIPMAN,

/s/ BURNHAM EVERSON,

McCUTCHEN, THOMAS,

MATTHEWS, GRIFFITHS,

& GREENE,

Attorneys for Defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company.

PILLSBURY, MADISON
& SUTRO,

/s/ FELIX T. SMITH,
/s/ EVERETT A. MATHEWS,

WHITMAN, RANSOM,
COULSON & GOETZ,

By /s/ EVERETT A. MATHEWS,

Attorneys for Defendant, The
Western Realty Company.

EXHIBIT A

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N. Y.

February 11, 1947. .

The Honorable Joseph D. Nunan, Jr.,
Commissioner of Internal Revenue,
Washington, D. C.

Attention: Mr. Frank Eddingfield.

Re: The Western Pacific Railroad Corpora-
tion and Affiliated Corporations 1942,
1943 and 1944 Federal Income Taxes.

Dear Sir:

The Western Pacific Railroad Corporation and
its affiliated subsidiaries filed consolidated returns

for the calendar years 1942 and 1943 and the said Western Pacific Railroad Corporation filed a consolidated return for the calendar year 1944 including therein its said subsidiaries for the period from January 1, 1944, to April 30, 1944, during which period affiliation existed.

On the said return for 1942 a consolidated tax liability of \$4,201,821.54 was reported and duly assessed and paid. On the said return for 1943 there was reported a net loss and no taxable income. On the said return for 1944, based on a carryover of the unused 1943 net loss, there was reported no taxable income and no tax liability. A claim for refund of the tax so paid for 1942, based on a carryback of the said 1943 net loss, was filed and is now pending in your office.

The taxpayer on behalf of itself and its aforesaid affiliated subsidiaries hereby offers to settle and determine the tax liabilities of the said corporations for the said taxable years 1942, 1943 and 1944 in the amounts shown on the returns filed as aforesaid. This proposal of settlement does not relate to or affect the tax liability of the said subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated. The within proposal is made without prejudice to any rights or claims of the parties, if the proposal is not accepted by you.

As part of this proposal The Western Pacific Railroad Corporation, on behalf of itself and its

aforesaid affiliated subsidiaries agrees that, if this proposal is accepted, it will consent to a rejection of the said claim for refund of the 1942 taxes and further agrees not to sue upon said claim or file other or further claims in respect of 1942 taxes on any ground whatsoever. It is further agreed by the said The Western Pacific Railroad Corporation on behalf of itself and its aforesaid affiliated subsidiaries that if this proposal is accepted it will execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal Revenue for the purpose of effectuating the settlement.

Authority for the submission of the within proposal of settlement by the undersigned is contained in a Power of Attorney heretofore filed in your office.

Respectfully,

THE WESTERN PACIFIC
RAILROAD CORPORATION,
JAMES K. POLK,
Attorney-in-Fact.

Treasury Department
Washington 25

Aug. 13, 1947.

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to
IT:R:A-4
JES

The Western Pacific Railroad Corporation
and Affiliated Companies,
c/o Mr. James K. Polk,
40 Wall Street,
New York 5, New York.

In re: Years—1942, 1943 and 1944.

Gentlemen:

Reference is made to your letter dated February 11, 1947, regarding the examination of income and profits tax returns for the years indicated above.

You are advised that all the administrative action in connection therewith, based upon the record supplied this office by the internal revenue agent in charge, has been completed and the returns placed in the closed files.

Very truly yours,

E. J. McLARNEY,
Deputy Commissioner.

Treasury Department
Washington 25

Aug. 26, 1947.

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to
IT:C1:CC: Rej

The Western Pacific Railroad Corp.,
c/o Mr. J. K. Polk,
40 Wall Street,
New York 5, New York.

In re: Claims for refund of \$4,201,821.54,
\$7,454.73 and \$161,449.48.

For the year 1942

Gentlemen:

In accordance with the provisions of section 3772(a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

E. J. McLARNEY,
Deputy Commissioner.

994M

[Endorsed]: Filed September 5, 1947.

[Title of District Court and Cause]

ANSWER OF THE WESTERN PACIFIC
RAILROAD COMPANY ET AL TO COM-
PLAINT IN INTERVENTION

Come now defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company, and pursuant to order of court and without waiving any of the objections to the complaint in intervention made by defendants' motions to strike portions of that complaint, and specifically reserving the right to make further objections and to assert further defenses to that complaint by way of answer, motion or otherwise after a ruling upon those motions, allege by way of answer to the complaint in intervention as follows:

I.

Defendants admit the allegations of paragraph I.

II.

Defendants admit the allegations of paragraph II except that defendants allege that Deep Creek Railroad Company was in liquidation in 1942, 1943 and 1944 and was finally dissolved in 1944.

III.

Answering the allegations of paragraph III, defendants admit the allegations of subparagraph (a). They further admit that defendant The Western

Pacific Railroad Company was in reorganization from August 2, 1935, to March 28, 1946, and that from on or about September 23, 1935, to December 29, 1944, the properties of defendant The Western Pacific Railroad Company were held and operated by the Reorganization Trustees. Defendants deny the remaining allegations of paragraph III.

IV.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph IV and on that ground they deny them.

V.

Answering paragraph V, defendants admit the allegations of subparagraph (a). They further admit that prior to April 30, 1944, plaintiff owned all the stock of defendant The Western Pacific Railroad Company; that plaintiff also owned the stock of The Western Realty Company and fifty per cent of the stock of The Denver and Rio Grande Western Railroad Company; that defendant The Western Pacific Railroad Company was in reorganization from August 2, 1935, to March 28, 1946; that the Interstate Commerce Commission, this Court and the Supreme Court determined in connection with the reorganization that the stock of defendant The Western Pacific Railroad Company was without equity or value; that an agreement was made as of November 22, 1943, providing among other things for the transfer of that

stock to the reorganization committee appointed in the reorganization proceeding; that the transfer took place on or about April 30, 1944; that on December 29, 1944, the reorganization trustees returned to defendant The Western Pacific Railroad Company all of its properties. Defendants deny the remaining allegations of paragraph V.

VI.

Answering paragraph VI, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in that paragraph and on that ground they deny them, except that defendants admit that the stock of defendant The Western Pacific Railroad Company was found to be without value in the reorganization proceeding.

VII.

(a) Answering the allegations of subparagraph (a) of paragraph VII, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of those allegations and on that ground they deny them, except that defendants admit that defendant The Western Pacific Railroad Company prior to reorganization was indebted to the A. C. James Company in the amount of \$4,999,800, which indebtedness was secured by general and refunding mortgage bonds of defendant The Western Pacific Railroad Company in the face amount of \$4,249,500 and defendants further admit that Robert E. Coulson was a mem-

ber of the reorganization committee appointed by this Court in the reorganization proceeding.

(b) Answering the allegations of subparagraph (b) of paragraph VII, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of those allegations and on that ground they deny them, except that defendants admit that pursuant to the plan of reorganization, bonds and stock of the reorganized company were issued to the A. C. James Company and that as of April 22, 1946, the James Foundation of New York, Inc., was the largest single stockholder of defendant, The Western Pacific Railroad Company. Defendants deny that the Foundation now dominates or controls defendant, The Western Pacific Railroad Company, or that it has ever done so.

(c) Answering the allegations of subparagraph (c) of paragraph VII, defendants admit that Robert E. Coulson and William W. Carman are officers of the James Foundation of New York, Inc.; that Robert E. Coulson was at one time a director of plaintiff corporation; that Robert E. Coulson was a member of the reorganization committee and signed the agreement of November 22, 1943; that Robert E. Coulson is now and since the reorganization has been a director of defendant, The Western Pacific Railroad Company; that Robert E. Coulson is now and for some time has been a partner in the law firm of Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York

City, the firm representing The Western Realty Company in this litigation; that the Reorganization Trustees participated in engaging James K. Polk of that firm as tax counsel to represent the affiliated group of corporations; that William W. Carman executed the agreement of November 22, 1943; that William W. Carman was at one time a director of plaintiff corporation; that Michael J. Curry has been and now is an officer and director of plaintiff corporation; that Michael J. Curry executed the agreement of November 22, 1943; that Mary C. Valouch has been and now is an officer of plaintiff corporation; that Mary C. Valouch is an employee of the firm of Whitman, Ransom, Coulson & Goetz; that Thomas M. Schumacher has been and now is a director of plaintiff corporation and was at one time its president; that Thomas M. Schumacher was one of the Reorganization Trustees in the reorganization proceeding. Defendants deny the remaining allegations of subparagraph (c).

(d) Defendants deny the allegations of subparagraph (d) of paragraph VII.

VIII.

(a) Defendants deny the allegations of subparagraph (a) of paragraph VIII.

(b) Answering the allegations of subparagraph (b) of paragraph VIII, defendants admit that the consolidated returns for the years 1943 and 1944 and the refund claim for 1942 were filed

after October 11, 1943, and after November 22, 1943; that the stock of defendant, The Western Pacific Railroad Company, was transferred to the reorganization committee on April 30, 1944; that plaintiff corporation had no taxable income for 1942, 1943 and 1944. Defendants deny the remaining allegations of subparagraph (b).

(c) Defendants deny the allegations of subparagraph (c) of paragraph VIII.

(d) Defendants deny the allegations of subparagraph (d) of paragraph VIII, except that defendants admit and allege that any refund which might have been made pursuant to the refund claim, and any fund in any way attributable to that claim, belongs to defendant, The Western Pacific Railroad Company.

IX.

Answering the allegations of paragraph IX, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of those allegations and for that reason they deny them, except that defendants admit that until this action was filed plaintiff corporation never asserted the claim which is the subject of this action and except that defendants specifically deny that defendants or any one of them dominate or control plaintiff corporation and defendants further deny that this action was commenced for or on behalf of or at the instance of the defendants, or any of them, or that this action is in any respect collusive.

X.

Answering the allegations of paragraph I of the second cause of action, defendants refer to paragraphs I to IX, inclusive, of this answer and by this reference incorporate into this paragraph the allegations there appearing.

XI.

Answering the allegations of paragraph II of the second cause of action, defendants admit that defendant, The Western Pacific Railroad Company, was in reorganization from August 2, 1935, to March 28, 1946, and that the final order in the reorganization proceeding was entered March 28, 1946. Defendants deny the remaining allegations of paragraph II.

XII.

For a further and separate defense to the complaint in intervention, defendants allege that said complaint and each cause of action therein fails to state a claim against defendants, or any of them, upon which relief can be granted.

XIII.

For a further and separate defense to the second cause of action of the complaint in intervention, defendants allege that this court, without bankruptcy jurisdiction, has no jurisdiction over the subject matter of the second cause of action.

XIV.

For a further and separate defense to the complaint in intervention, defendants allege that the

issues framed by said complaint are not within the scope of this action and are not properly the subject of a complaint in intervention.

XV.

For a further and separate defense to the complaint in intervention defendants allege that said complaint does not name as defendants indispensable and necessary parties.

XVI.

(a) During the years 1942 and 1943 and the first four calendar months of the year 1944, the plaintiff and the defendants, including the defendant, Deep Creek Railroad Company, which was in the process of liquidation in the years 1943 and 1944, were an affiliated group of corporations within the meaning of the Internal Revenue Code. Plaintiff was at all said times the parent corporation of said group and filed income and excess profits tax returns on a consolidated basis for said group for the said years 1942 and 1943. In the year 1945, plaintiff filed an income and excess profits tax return for the year 1944 and included in said return the income of the other members of said affiliated group for the first four months of 1944. The said consolidated return for the year 1942 reported income and excess profits tax payable by the affiliated group in the sum of \$4,201,821.54, and the aforesaid returns for the years 1943 and 1944 reported no taxable income. On March 9, 1945, the plaintiff filed with the Federal Collector

of Internal Revenue in the Second District of New York, a claim for refund of the sum of \$4,201,821.54 theretofore paid as income and excess profits taxes for 1942, together with the interest thereon. The whole of said last mentioned amount of tax was paid in 1943 by plaintiff with funds supplied to plaintiff for that purpose by the Reorganization Trustees of defendant, The Western Pacific Railroad Company. Thereafter and in the year 1943, certain of the defendants herein paid or credited to said Reorganization Trustees their respective portions of said tax, so that the net amounts of said tax borne and paid by the parties of this suit were as follows:

Plaintiff	\$	00.00
Defendant The Western Pacific Railroad Company.....		4,144,828.87
Defendant Sacramento Northern Railway		2,847.58
Defendant Tidewater Southern Railway Company		53,608.94
Defendant The Western Realty Company.....		00.00
Defendant Deep Creek Railroad Co.		00.00
Defendant Standard Realty and Development Company.....		00.00
Defendant Delta Finance Co., Ltd....		536.15
		<hr/>
Total	\$	4,201,821.54

On or about September 1, 1947, the tax liability of the affiliated group to the Federal Government for the years 1942, 1943 and 1944 was settled by an agreement whereunder the 1942 refund claim was denied and the 1943 and 1944 returns were accepted as filed. This settlement is the subject of a stipulation filed in this action on September 5, 1947. In so far as that stipulation requires that this action be determined as though the 1942 refund had been allowed in part, defendants allege that defendant, The Western Pacific Railroad Company, is entitled to the whole of said sum together with all interest thereon, and to the whole amount refunded. Defendant, The Western Pacific Railroad Company, will credit or pay to the defendants Sacramento Northern Railway, Tidewater Southern Railway Company, and Delta Finance Co., Ltd., their respective proportions thereof, and said three last named defendants look to defendant, The Western Pacific Railroad Company, for such credit or payment. None of the parties to the above entitled cause, other than the defendant, The Western Pacific Railroad Company, and said last named three defendants, paid or contributed any sum or thing of value to the payment of said tax or any part thereof, and none of said parties other than the defendant, The Western Pacific Railroad Company, has any right, title, interest or claim, at law or in equity, in or to said refund claim or the amount refundable thereunder or any part thereof. Under and by virtue of the Internal Revenue Code

and the regulations thereunder providing for and relating to consolidated returns for affiliated corporations, the tax liability of said affiliated group for Federal income and excess profits taxes was required to be, and was, determined upon the basis of the taxable net income of the said group as a unit. Provision for the allocation to the respective members of such group of their proportion of the tax so determined to be payable was lawful and proper, and the whole of said tax for 1942 was allocated to the defendant, The Western Pacific Railroad Company, and the three other defendants aforesaid, as above set forth, but no right, title, interest or claim was created or arose, or could be created or arise, on the part of any member of said affiliated group against any other member thereof, by virtue of said consolidated returns or any thereof, or by virtue of the individual deductible losses or taxable gains of such members, or otherwise, for any sum in excess of the portion of the tax actually paid or payable by the member making such claim. In the year 1943, plaintiff and other members of said group incurred deductible losses in a total amount sufficient to eliminate all taxable income for the affiliated group for 1943 and to provide unused credit balances to carry back to 1942 and carry forward to 1944 sufficient to establish no taxable income for the years 1942 and 1944, and in said federal tax returns for 1943 and 1944 plaintiff reported said losses and said carry-back and carry-forward por-

tions thereof, and the aforesaid claim for refund of the 1942 taxes referred to the said carry-back. The major portion of the aforesaid deductible losses incurred in the year 1943 was the loss of plaintiff arising from the fact that the stock of the defendant, The Western Pacific Railroad Company, held by plaintiff became worthless in said year. In and by reporting said loss in said returns for 1943 and 1944, and in and by referring to the same in filing said claim for refund, plaintiff suffered no detriment, loss, cost or expense and furnished no legal or equitable consideration or contribution to the members of the affiliated group or to any of them.

(b) By the terms of the Internal Revenue Code and the regulations thereunder, any amount refundable under said refund claim is and was payable by the United States to the plaintiff as collecting agent for the member of said group, namely, defendant, The Western Pacific Railroad Company, which originally provided the moneys for payment of the tax. Said claim was filed and was made for the use and benefit of said defendant as the member of said affiliated group which provided the moneys for payment of the entire tax for the group. The other defendants which contributed to the payment of said tax, namely, Sacramento Northern Railway, Tidewater Southern Railway Company, and Delta Finance Co., Ltd., will look to defendant, The Western Pacific Railroad Company, for such credit or payment as may be appropriate.

Plaintiff is not entitled beneficially to the refund of the same or any part thereof or any interest thereon. Neither said claim for refund nor the moneys that are refundable thereunder constitute or are a fund of said affiliated group, or a fund in respect whereof the members of said group may interplead or be interpleaded, but on the contrary said claim was at all times the exclusive right and property of defendant, The Western Pacific Railroad Company, and said defendant is entitled to the whole sum refundable or deemed to be refundable thereunder.

XVII.

Defendant, The Western Pacific Railroad Company, has a reserve fund for contingent tax liabilities in the sum of \$10,100,000, invested in United States Government securities, for the purpose of discharging the liability of said defendant for such federal income and excess profits taxes, if any, as may be imposed upon said defendant for the years 1943 and 1944. Neither the plaintiff nor any member of said affiliated group other than defendant, The Western Pacific Railroad Company, furnished or contributed any money or other thing of value to said fund. Said fund and the securities comprising the same are the exclusive property of the defendant, The Western Pacific Railroad Company, and the said fund is held by said defendant to provide for the payment of its own taxes, if any are payable by it, and not for the benefit, advantage, use or behoof of plaintiff or any other

member of said group. Neither said fund nor any part thereof is a fund of said affiliated group, or a fund in respect whereof the members of said group may interplead or be interpleaded, and neither plaintiff nor any member of said affiliated group other than the defendant, The Western Pacific Railroad Company, has any right, title, interest or claim in or to said fund, or in or to any part thereof, at law or in equity.

XVIII.

It was plaintiff's duty under the Internal Revenue Code and regulations to make and file income and excess profits tax returns for the years 1942, 1943 and 1944. In and by making and filing said income and excess profits tax returns for the years 1942 and 1943 and 1944, plaintiff performed its said duty in accordance with the requirements of the Code and regulations. Plaintiff as a separate corporation had no income or excess profits tax liability on either a separate or a consolidated basis for 1942, 1943 and 1944 and paid no tax for any of said years. In and by filing said returns plaintiff furnished no consideration or contribution whatsoever to other members of said affiliated group, or any of them, and suffered no detriment, loss, cost or expense for itself or for said members or any of them, in that its action in filing said returns was performed under a duty imposed by law.

XIX.

In and by filing the said returns for the years 1942, 1943, and 1944, and in and by filing said refund claims, plaintiff acted as the agent and representative of the affiliated group to file such returns and claim for refund, but plaintiff did not therein or thereby gain or acquire any right or claim as against any other member of said group to be paid any sum or sums or receive anything of value for or on account of filing said returns or claim, or for or on account of theoretical taxes not paid or payable by said group or any member thereof, and on the contrary the exaction or receipt by plaintiff from the members of said group or any thereof, of any sum or other thing of value, for or on account of so-called tax savings, to wit, moneys not paid or payable as taxes, by any other member or members of said group, resulting from the filing of consolidated returns, would have been and was and is inequitable, unjust, and unconscionable, and the claims made by plaintiff and by the intervenor in this cause to payment or other compensation for or on account of such tax savings, were and are inequitable, unjust, and unconscionable, in that plaintiff was an agent and fiduciary for the members of said affiliated group in making said returns, and may not lawfully or equitably use or avail of its said agency to obtain or secure a profit or advantage for itself at the expense of other members of said group for whom it was such agent.

XX.

In and by filing the said returns and filing said refund claim, plaintiff acted as the agent and representative designated by the Internal Revenue Code and the regulations thereunder relating to consolidated returns for affiliated groups, but plaintiff did not therein or thereby gain or acquire any right or claim as against any other member or members of said group to be paid any sum or sums or receive anything of value for or on account of filing said returns or claim, or for or on account of taxes not paid or payable by said group or any member thereof, and on the contrary the exaction or receipt by plaintiff or by the intervenors from the members of said group or any thereof, of any sum or other thing of value, for or on account of such filing or said taxes not paid or payable, would have been and was and is illegal, unjust and inequitable, and contrary to the intent and purpose of the Internal Revenue Code and the regulations thereunder, and plaintiff's claims and the claims of the intervenors in this case are illegal, unjust and inequitable, and contrary to the intent and purposes of the Code and said regulations, in that such exaction or receipt and the claims made by plaintiff and by the intervenors in this cause would constitute and be a purchase and sale of deductible tax losses, or exaction of compensation therefor, and a sale of the privilege of filing consolidated returns, contrary to the intent and purpose of the said statutes, and the regulations thereunder.

XXI.

At the time plaintiff filed said consolidated returns for the year 1943, to wit, July 15, 1944, wherein plaintiff reported its said large deductible loss of 1943, plaintiff had an interest in the said affiliated group, in that plaintiff was then entitled, under certain contingencies, to regain the ownership of all the stock of the defendant, The Western Pacific Railroad Company, and plaintiff's act and decision in filing the same was done and taken for the advantage and benefit of plaintiff in that plaintiff's said contingent interest in the stock of said defendant gave to plaintiff an interest in the effect upon the tax liability of said defendant of filing said consolidated returns. In and by reporting said deductible loss in said consolidated return, plaintiff elected to, and became bound to, apply the carry-back portion thereof to the year 1942, and to file a refund claim on account of such carry-back and the aforesaid refund claim was thereafter filed by plaintiff in pursuance of its said election and obligation so to do.

XXII.

Ever since the year 1918 and until April 30, 1944, plaintiff was the parent corporation of and controlled the members of an affiliated group of corporations and determined whether or not consolidated returns should be filed for said group, including itself, and therein and thereby exercised for itself and said group and in the common interests of the members of the group and the interest of

the plaintiff as the sole owner of the ultimate equity in the group the statutory privilege extended by the applicable provisions of The Revenue Acts and Section 141 of the Internal Revenue Code of filing or not filing consolidated returns and elected continuously in favor of consolidated returns and therein and thereby plaintiff elected for itself and the other members of said group and from time to time committed the group for future years to file such consolidated returns. The defendants The Western Pacific Railroad Company and Deep Creek Railroad Company were members of said affiliated group at all of said times and the other defendants herein were members of said group at various times. In and by its said control and elections from time to time plaintiff derived many advantages and benefits in the manner and to the extent intended by the said statutes and regulations, including, among others, the future consequences of such elections, as well as the results and effects in the years of filing the returns, and the various members of said group, including plaintiff, had variously individual incomes and deductible losses taken up in said consolidated returns from year to year. At all said times plaintiff controlled the allocation of the taxes as between the members of said group, and continuously and consistently allocated the group tax for each year between the members of said group, including itself, who had individual taxable incomes in such year, in the proportions that their individual incomes bore to the total of such incomes, ignoring

losses of other members of the group, but plaintiff never charged itself nor claimed credit for itself or charged or claimed credit for any member of said group for or on account of theoretical taxes not payable by the group in consequence of deductible losses suffered or incurred by one or more of its members in years when other members had taxable gains. Neither plaintiff nor the interveners made any claim of that nature against or in favor of any member of the group until the making of the claims stated in its complaint herein, which said claims were not made until long after the said affiliation had been severed and were made at a time when plaintiff had no ownership of or interest in said group or any member thereof. Plaintiff and the interveners as stockholders of plaintiff and all other members of said group became bound by, and agreed to, the said long continued custom and practice of allocating between the members of said group the actual group tax, and no more, and therein and thereby plaintiff waived and relinquished whatsoever right it might otherwise have had to claim as against any member of said group, any other or further allocation, adjustment or claim arising out of the filing of such consolidated returns or the individual taxable gains and deductible losses of the members of said group. By reason of said custom, practice and agreement and by reason of the advantages and benefits received by plaintiff from the said exercise of its privilege of filing consolidated returns for said group for all said years, plaintiff's

claims and the claims of the interveners in this suit are unjust, inequitable and unconscionable.

XXIII.

At all times mentioned herein to and including April 30, 1944, plaintiff was the owner and holder of all of the capital stock of defendant The Western Pacific Railroad Company. From August 2, 1935, to December 29, 1944, defendant The Western Pacific Railroad Company was a railroad corporation in reorganization under the provisions of Section 77 of the Bankruptcy Act, in that certain proceeding in the United States District Court for the Northern District of California, Southern Division, entitled "In the Matter of The Western Pacific Railroad Company," No. 26591-S in the files of said Court, and the title to and possession of all of its properties were at all times from September 23, 1935, to December 29, 1944, held by T. M. Schumacher and Sidney M. Ehrman, as the Reorganization Trustees appointed by said court. Said defendant The Western Pacific Railroad Company was reorganized in said proceeding under a Plan of Reorganization filed by the Interstate Commerce Commission June 21, 1939, which said Plan of Reorganization was finally confirmed by said Court by its order in said proceeding made October 11, 1943. In and by said Plan of Reorganization as finally confirmed October 11, 1943, it as determined that the stock of said defendant held by plaintiff herein, being all of the preferred and common capi-

tal stock of said defendant, was without equity or value. Under and pursuant to said Plan of Reorganization and the order of said Court in said proceeding made November 27, 1944, and at 12:01 A.M., on December 29, 1944, said Trustees returned and transferred to the said reorganized corporation, defendant The Western Pacific Railroad Company, all the business, assets and property, of every kind and description held by said Trustees in said bankruptcy proceeding, free and clear of all claims other than such claims as were preserved under the said Plan of Reorganization and were not limited or discharged by the orders of said Court.

XXIV.

In and by their claims against the defendant The Western Pacific Railroad Company and against and in respect of the said reserve and the said refund claim belonging to the defendant The Western Pacific Railroad Company, plaintiff and the interveners seek to establish and enforce liens senior to the liens of those claimants in said reorganization proceeding whose liens were found to have equity and value and were preserved and provided for in the said Plan of Reorganization, and plaintiff and the interveners seek thereby to gain a preference over such claimants. The entire business, assets and properties of said reorganized company were returned and transferred to it by said Trustees pursuant to said Plan and the orders of said Court, subject only to the claims so preserved. In and

by said Plan of Reorganization all claims junior to the claims of First Mortgage Bondholders and General and Refunding Mortgage Bondholders of said defendant The Western Pacific Railroad Company were found and determined to be without equity or value, and the claims of said bondholders were preserved, and were paid and discharged under said Plan in common stock, and other securities, of the said reorganized company, so that the said bondholders became the owners of the entire common stock of the reorganized company. Plaintiff's aforesaid claims and the claims of the interveners in this cause and each of them are unjust, inequitable and unconscionable in this, that the aforesaid deductible loss incurred by plaintiff, and the filing of said federal tax returns and refund claim reporting said loss, furnish no just or equitable ground or reason for giving or granting to plaintiff a preference over said prior claimants, to wit said bondholders, as to all or any part of said reserve fund or said refund claim or any other assets or property of said reorganized company, but said claims of plaintiff and the interveners cannot now be recognized or allowed in any manner or to any extent without thereby granting such inequitable preference.

XXV.

Each and all the claims of plaintiff and the interveners in and to said reserve fund, or any portion thereof, and in and to said refund claim, or the amount refundable thereunder, are unjust,

inequitable, and unconscionable in all the respects hereinafter in this paragraph averred or mentioned. Said claims and each of them arose and could have been presented to the said Bankruptcy Court more than two years before the commencement of this action. Plaintiff was a party to said reorganization proceeding and had personal notice of all of the proceedings in the Bankruptcy Court and before the Interstate Commerce Commission in respect of the business, assets and properties of the defendant The Western Pacific Railroad Company and the Plan of Reorganization thereof. The interveners, at any time after they purchased their stock interest in plaintiff, could have asked leave of court to be made parties to the reorganization. No such leave was requested. Plaintiff and the interveners stood by and wholly failed and neglected to present their claims, or any thereof, to the said Court or to said Commission or to the said Reorganization Trustees or to the defendant The Western Pacific Railroad Company, and wholly failed to notify the said Court, Commission, Trustees or defendant company thereof prior to the effectuation and consummation of said Plan of Reorganization, and permitted the said Plan to be effectuated and consummated without presenting or giving notice of said claims to said Court, Commission, Trustees or defendant company so that said Plan of Reorganization was effectuated and consummated by said Trustees pursuant to said Plan and the orders of said Court and Commission, and all parties in interest under

said Plan accepted and received the new securities and the other provisions made for them under said Plan, without notice of plaintiff's said claims, or the claims of the interveners or any thereof. Plaintiff and the interveners further stood by and wholly failed and neglected to present claims, or any thereof, to the said Court, Trustees and defendant company, or any thereof, and wholly failed to notify them or any of them of such claims or any thereof, prior to the final settlement of the accounts of said Trustees by said Court, and prior to the termination of said reorganization proceedings, and permitted said accounts to be settled and said proceedings to be terminated without giving notice of said claims or any thereof, or presenting the same or any thereof, and all parties in interest participated in the said proceedings, and said accounts were settled and allowed, and said proceedings were terminated, without any party to said proceedings having notice of said claims or any thereof. In and by the neglect and conduct of plaintiff and the interveners aforesaid plaintiff and the interveners were guilty of laches and the said claims and each and all thereof became and are stale and inequitable, and barred by the said laches and inequitable conduct and neglect. These defendants refer to the averments of the preceding paragraphs of this answer in connection with and as stating further grounds for their defense that plaintiff's claims and the claims of the interveners are stale and barred by laches.

XXVI.

The rights of action set forth in the complaint in intervention in respect of, or pertaining to, that portion of the reserve fund created by said court order, to wit, \$7,100,000 did not accrue within two years next before the commencement of this action. The rights of action set forth in said complaint in respect of the remainder of said reserve fund, to wit, \$3,000,000 and in respect of the said refund claim, to wit, the claim for refund of \$4,201,821.54 taxes paid for the year 1942, did not accrue within two years next before the commencement of this action.

XXVII.

Said Bankruptcy Court on March 28, 1946, made its Final Order in said reorganization proceeding terminating said proceeding, subject only to the reservations of jurisdiction made and referred to in said order, and in and by said order said Court permanently restrained and enjoined all persons from instituting, prosecuting or pursuing claims against said defendant The Western Pacific Railroad Company, or against any of the assets or property of said defendant, on account of any right, claim or interest which such person might have had in, to or against said defendant, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of said Court). In and by said Final Order plaintiff and the interveners were and are forever restrained and enjoined from instituting

or prosecuting this cause as against the defendant The Western Pacific Railroad Company and from instituting or prosecuting any action or proceeding to establish or enforce the claims and each thereof against said defendant which are set forth in their complaints herein.

XXVIII.

In and by said Plan of Reorganization and the said Orders of said Court, and each of them, plaintiff and the interveners were and are forever barred and foreclosed from claiming as against the defendant The Western Pacific Railroad Company all or any part of the aforesaid claim for refund of taxes paid by said Trustees in the sum of \$4,201,-821.54, and forever barred and foreclosed from claiming all or any part of the said refund; and any sum payable upon said refund claim, including interest thereon, became and was and is the property and asset of defendant The Western Pacific Railroad Company, free and clear of all claims and demands of plaintiff or the interveners.

XXIX.

In and by said Plan of Reorganization and the said Orders of said Court, and each of them plaintiff and all parties to this action other than defendant, The Western Pacific Railroad Company, were and are forever barred and foreclosed from claiming all or any part of said reserve fund of \$10,100,-000 and forever barred and foreclosed from claiming against said defendant any sum or contribution

whatsoever on account of the so-called tax savings, to wit, the nonexistence of taxable net income, reported by the said returns filed for the years 1943 and 1944, and the entire business, assets and property returned and transferred by said Reorganization Trustees to said defendant were in and by said Plan and Orders returned and transferred to said defendant free and clear of all such claims of plaintiff and the interveners and the other members of said affiliated group or any of them. In and by said Orders of said Court and the said Plan of Reorganization and each of them, each and every, all and singular, the claims of plaintiff and the interveners in this cause against the defendant, The Western Pacific Railroad Company, were and are forever barred and foreclosed.

XXX.

Said Bankruptcy Court on March 3, 1944, made its order authorizing and directing the said Trustees to establish a reserve fund for contingent tax liabilities in the amount of \$7,100,000 for the sole and exclusive purpose of providing for the payment of federal income and excess profits taxes for the year 1943 in the event the same should become payable by said Trustees or by the reorganized company, defendant, The Western Pacific Railroad Company. In and by said Order, said reserve fund became and was, and is, a fund belonging exclusively to the reorganized company, defendant, The Western Pacific Railroad Company, and may not be subjected to the claims of the interveners or the

claims of the other members of the said affiliated group or any of them. Said reserve fund created by said Court order is a part of the reserve fund of \$10,100,000 mentioned in the complaint in intervention. The remainder of said reserve fund, to wit, \$3,000,000, was created by resolution of the Board of Directors of the reorganized company, The Western Pacific Railroad Company adopted March 26, 1945, for increasing said reserve fund held for said purposes, exclusively, to the sum of \$10,100,000. Neither plaintiff nor the interveners, nor any other member of the affiliated group, other than defendant, The Western Pacific Railroad Company, has ever contributed anything to said reserve fund and neither plaintiff nor the interveners nor any of the said other members of said group have any right, title, interest or claim in or to said reserve fund, or in or to any portion thereof at law or in equity.

XXXI.

At all times from August 2, 1935, until March 28, 1946, the rights of plaintiff against the defendant, The Western Pacific Railroad Company, and the Reorganization Trustees were before this Court for adjudication in the reorganization proceeding. Plaintiff and the interveners could have obtained in that proceeding an express adjudication of the claims which are presented in this action. Their failure to do so renders those claims forever barred under the principles of *res judicata*.

XXXII.

At no time before the institution of this action did plaintiff or the interveners in any way assert the claims which are the subject of this action. If they had asserted those claims promptly, the defendant, The Western Pacific Railroad Company, the Reorganization Trustees and all parties to the reorganization proceeding could have applied to this Court, conducting the reorganization, for an order directing plaintiff to file the consolidated returns for 1942, 1943 and 1944 and the refund claim for 1942 without any charge by the plaintiff or the interveners or any compensation to them. If that application had been denied, the Reorganization Trustees and the defendants could then have elected to file separate income tax returns and to avail themselves of the rights, privileges, options and advantages belonging to persons who pay taxes to the Federal Government. The Reorganization Trustees and the defendants could have taken steps to improve their tax position by, among other things, taking advantage of the tax benefit which would arise from a determination of the insolvency of defendant Sacramento Northern Railway. The Reorganization Trustees and the defendants have in reliance upon the silence of plaintiff and the interveners changed their position to their detriment. Plaintiff and the interveners are therefore estopped from asserting their claims. They are also estopped from maintaining in this action a position inconsistent with the position plaintiff maintained in the

reorganization proceeding. Plaintiff and the interveners are further precluded from maintaining their claims by reason of the fact that the concurrence of each member of the affiliated group was necessary in order that consolidated returns might be filed. The claims of plaintiff and of the interveners to the alleged tax saving are therefore unjust and unconscionable because plaintiff's claim to that alleged saving could in no event be better than the claim of each of the defendants.

XXXIII.

Defendants are informed and believe and upon information and belief allege that the interveners are foreclosed from asserting the claims which are the subject of complaint in intervention by reason of the fact that the persons from whom they purchased their stock in the plaintiff corporation are estopped from asserting those claims and by reason of the further fact that the interveners are not qualified to maintain a stockholders' suit on behalf of plaintiff corporation.

XXXIV.

Defendants allege that by reason of the circumstances set forth in this answer, the claims of plaintiff and the interveners are barred by each of the following affirmative defenses: Discharge in bankruptcy pursuant to Section 77, of the Bankruptcy Act, res judicata, estoppel, laches, failure of consideration, illegality, statute of limitations and waiver.

XXXV.

Defendants deny each of the allegations of the complaint in intervention which is not specifically admitted in this answer.

Wherefore, defendants pray for the order, judgment and decree of this Honorable Court:

1. Declaring and determining that defendant, The Western Pacific Railroad Company, is the sole owner of and is exclusively entitled to said reserve fund and said refund claim and all sums refundable thereunder and quieting the right and title of said defendant therein and thereto against the claims of plaintiff and the interveners and all other parties to this cause and restraining and enjoining plaintiff and the interveners and all other parties to this cause other than defendant, The Western Pacific Railroad Company, from instituting or prosecuting claims thereto.

2. Declaring and determining that neither plaintiff nor the interveners have any rights or claims against these defendants or any of them for or on account of any matter or thing averred in the complaint in intervention.

3. For defendants' costs of suit herein and such

other and further relief as may be meet and equitable in the premises.

Dated: November 5, 1947.

THE WESTERN PACIFIC RAILROAD COMPANY,

SACRAMENTO NORTHERN RAILWAY,

TIDEWATER SOUTHERN RAILWAY COMPANY,

DELTA FINANCE CO., LTD.,

STANDARD REALTY AND DEVELOPMENT COMPANY.

By /s/ ALLAN P. MATTHEW,

JAMES D. ADAMS,

ROBERT L. LIPMAN,

BURNHAM ENERSEN,

Their Attorneys.

Receipt of copy attached.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 5, 1947.

[Title of District Court and Cause.]

SUPPLEMENTAL BILL OF COMPLAINT

The Western Pacific Railroad Corporation, the plaintiff herein by leave of Court first had and obtained, files this, its Supplemental Bill of Complaint, and respectfully shows and alleges as follows:

First: That at the time of the filing of the Bill of Complaint herein the consolidated excess profits and income tax returns of the plaintiff and its affiliated companies for the year 1942 and 1943 and the period January 1, 1944, to April 30, 1944 (hereinafter sometimes called "the three tax periods"), on which last named date affiliation ended, had not been finally audited and accepted by the Commissioner of Internal Revenue and the claim or cause of action therein set forth and alleged by plaintiff against all or any of its former affiliated companies, defendants herein, was inchoate and unliquidated; that sometime prior to the filing of the Bill of Complaint and prior to March 28, 1946, on which last named date the Bankruptcy Proceeding was terminated with certain reservations of jurisdiction, James K. Polk, tax counsel with the firm of Whitman, Ransom, Coulson & Goetz, undertaking and purporting at the instance of defendants to represent the separate as well as the common interests of plaintiff as well as of defendants entered into negotiations with the Commissioner of Internal Revenue for a settlement of their tax liabilities for the three tax periods under which

the Treasury of the United States (a) would accept as final the consolidated income and excess profits tax returns of the Affiliated Group for the three tax periods (b) allow in reduction of defendants' taxable income and profits the losses and credits that had accrued to plaintiff and (c) retain the tax payment made thereunder, being the sum of \$4,201,821.54 paid for 1942, and the plaintiff would withdraw or consent to the rejection of its then pending claim for a refund of said payment of \$4,201,821.54, together with interest thereon from the date of payment; and that on February 11, 1947, the aforementioned negotiations for a settlement of said tax liabilities had so far progressed toward a final and definitive agreement as to justify the transmission of a formal written offer of settlement.

Second: That on February 11, 1947, James K. Polk, one of the Attorney-in-Fact representing the plaintiff and its former affiliated companies (hereinafter called the Affiliated Group) and a member of the firm of Whitman, Ransom, Coulson & Goetz, tax counsel for the Affiliated Group, transmitted to the Commissioner of Internal Revenue a formal written offer of settlement which in terms was made on behalf of the plaintiff and its former affiliated companies, a true copy of which communication is hereto annexed and made a part hereof, marked Exhibit A.

Third: That the plaintiff had not been informed in advance of the transmission of said offer of settlement, Exhibit A, nor of the pendency of the

prior negotiations leading up thereto, nor of the probable realization of substantial tax savings, of which the plaintiff would be beneficiary, until many months after the transmission of Exhibit A when a copy thereof was furnished to the plaintiff by said James K. Polk of the firm of Whitman, Ransom, Coulson & Goetz with a request for approval and ratification of the action so taken on behalf of the Affiliated Group by him as their Attorney-in-Fact.

Fourth: That on August 13, 1947, the Board of Directors of the plaintiff approved and ratified the transmission of said offer subject, however, to the condition that the defendant, The Western Pacific Railroad Company, enter into a stipulation (afterwards approved by this Court) to be signed by the attorneys for the plaintiff and for the defendants (and afterwards so signed pursuant to the direction of this Court), a copy of which stipulation is hereto annexed and made a part hereof, marked Exhibit B.

Fifth: That on August 13, 1947, the Deputy Commissioner of Internal Revenue on behalf of the Treasury of the United States accepted the then pending offer of settlement in a communication dated on said date and addressed to the plaintiff and its affiliated companies, a true copy of which is hereto annexed and made a part hereof, marked Exhibit C.

Sixth: That thereafter, on August 26, 1947, the Deputy Commissioner of Internal Revenue in ac-

cordance with the terms of settlement previously accepted by him on behalf of the Treasury of the United States transmitted a communication dated on said date and addressed to the plaintiff which rejected the pending claim of the plaintiff for a refund of the taxes provided for by the Trustees of the defendant, The Western Pacific Railroad Company, and paid by the plaintiff as parent of the Affiliated Group for the year 1942 in the amount of \$4,201,821.54, a true copy of which communication is hereto annexed and made a part hereof, marked Exhibit D.

Seventh: That on said last mentioned date the claim of the plaintiff against defendants to account for the benefit and enrichment claimed by defendants for themselves through the utilization of plaintiff's deductible losses and credits in effecting tax savings became definitive and justiciable in an amount susceptible of mathematical calculation and thereupon the plaintiff employed the firm of Lybrand, Ross Bros. & Montgomery, Certified Public Accountants, to determine by a calculation the excess profits and income tax liabilities of the defendant, The Western Pacific Railroad Company, and each of the other defendants for the three tax periods on a separate or individual basis without the benefit of the authorized deductions and credits belonging to the plaintiff; and there here follows the summary made by said firm of Accountants of their computation for the three tax periods for each of said affiliated companies, which summary and computation the plaintiff hereby alleges to be correct:

	Period January 1 to		
	Year 1942	Year 1943	April 30, 1944
The Western Pacific Railroad Corporation:			
Excess profits tax	None	None	None
Income tax	None	None	None
The Western Pacific Railroad Company:			
Excess profits tax	\$4,825,020.69	\$10,614,539.48	\$1,397,379.67
Income tax	2,090,672.67	2,133,230.11	557,411.83
Total.....	<u>\$6,915,693.36</u>	<u>\$12,747,769.59</u>	<u>\$1,954,791.50</u>
Sacramento Northern Railway:			
Excess profits tax	None	None	None
Income tax	None	None	None
Tidewater Southern Railway Company:			
Excess profits tax	None	None	None
Income tax	\$ 55,907.03	\$ 19,843.16	\$ 2,460.73
Total.....	<u>\$ 55,907.03</u>	<u>\$ 19,843.16</u>	<u>\$ 2,460.73</u>
			78,210.92

	Year 1942	Year 1943	Period January 1 to April 30, 1944	Total
Deep Creek Railroad Company:				
Excess profits tax	None	None	None	None
Income tax	None	None	None	None
The Western Realty Company:				
Excess profits tax	None	None	None	None
Income tax	\$ 6,168.43	\$ 4,562.82	\$ 507.75	
Total.....	\$ 6,168.43	\$ 4,562.82	\$ 507.75	11,239.00
Standard Realty and Development Company:				
Excess profits tax	None	None	None	
Income tax	None	\$ 1,060.25	\$ 40.39	1,100.64
Total.....	None	\$ 1,060.25	\$ 40.39	
Delta Finance Company, Ltd.:				
Excess profits tax	\$ 910.57	None	None	
Income tax	2,265.06	906.15	None	
Total.....	\$ 3,175.63	\$ 906.15	None	4,081.78
				<u>\$21,712,886.79</u>

That, as heretofore alleged, there was paid, in respect to the tax liability of the Affiliated Group for the year 1942 the sum of \$4,201,821.54 the right to recover which upon claim for refund inured to plaintiff; that no other or additional payments were made to the Collector of Internal Revenue by the Affiliated Group; that, under the settlement hereinabove referred to, the said sum of \$4,201,821.54 was retained by the Treasury of the United States as representing full payment of the tax liability of the defendants for the three tax periods; that by reason solely of the plaintiff's surrender to defendants at their request of its separate right to the exclusive utilization of the heavy losses sustained by and credits belonging to the plaintiff, and of plaintiff's joinder at defendants request in the filing of consolidated returns of tax with them and consequent assumption of consolidated return liabilities and disabilities the acceptance of the proposed settlement by the Commissioner based upon recognition of plaintiff's losses and credits affected a net tax savings by defendants for the three tax periods amounting to the difference between the aggregate excess profits and income tax liabilities, which defendants had incurred and would otherwise have had to pay, as shown in the foregoing summary, amounting to \$21,712,886.79 and the sum accepted by the Government in said settlement; that said savings, retained and now in the possession of the defendants aggregate \$17,511,065.25.

Eighth: That the Internal Revenue Code dating back as early as the Revenue Act of 1917 has con-

tinuously provided for the filing of tax returns on a consolidated basis by closely affiliated corporations, in some periods the filing of such returns being mandatory, in others optional; in some periods by railroad companies only; in other periods (including the three tax periods in which the foregoing tax savings were effected) by corporations generally; but at no time has Congress made any express provision for the allocation to one or more members of an affiliated group for tax savings or benefits resulting from the filing of such returns on a consolidated basis.

Under the statutes of the United States and the regulations of the Treasury Department with regard to the filing of consolidated income and excess profits tax returns the parent is created the sole agent and representative of the group and the group is regarded as an economic unit governed and controlled by the parent corporation which is itself regarded as the taxpayer, each member of the group by joining in a consolidated return being made severally and individually liable to the United States for the entire tax payable for the group under such return, but without statutory provision for allocation of the tax liability among the group members inter sese. The reason for the absence of such provision is that the legislation contemplates a parent and subsidiary corporation relationship in which the parent is a proprietor entirely in control and by reason of its proprietorship accrues to itself the benefit and enrichment flowing from any

tax economies effected through the filing of consolidated income and excess profits tax returns. In the three tax periods in which the aforementioned tax savings were effected the legislative requirement was ownership directly or indirectly by the parent of at least 95% of the capital stock of each of the subsidiary corporations so that in normal circumstances there could not be a substantial diverse interest between the parent and any subsidiary corporation by reason of which an allocation upon principles of equity could become necessary to prevent the loss to the parent of its property interest in the tax savings flowing from utilization of its individual losses and credits in any consolidated income and excess profits tax returns. Since, however, the plaintiff herein lost its proprietary control of the defendant subsidiary corporations, although retaining the right to join with defendants in consolidated returns, prior to the date on which the earliest of the tax returns in question became due, the establishment of its inchoate right to an allocation of the tax benefits arising from the filing of the consolidated returns and the enforcement of such inchoate right upon its becoming definitive by settlement with the Government, requires the intervention of a Court of Equity if plaintiff is not to go remediless.

As is shown by the foregoing summary the defendants for the three tax periods incurred individual liabilities to pay to the Treasury of the United States amounts aggregating \$17,511,065.25

in addition to \$4,201,812.54 originally paid for 1942 as their tax burden in respect of war earnings during the three tax periods which under the policy of the Government implicit in the Revenue Code could not be retained as corporate income except as to a relatively negligible portion thereof. For the defendant, The Western Pacific Railroad Company, and any of the other defendants to be permitted to retain any part of said \$17,511,065.25 derived from their utilization of plaintiff's rights under the Internal Revenue Code to the detriment of plaintiff and to their own monetary advantage and derived from their utilization of plaintiff's losses and credits to the exclusion of plaintiff would be fortuitiously and unjustly to enrich them and would moreover permit them to keep wartime profits not taken by the Government solely because Congress allowed as an offset there against losses suffered by and credits belonging to the plaintiff, such losses and credits being allowed by the Congress solely in order that the plaintiff and its stockholders, as the owners of the enterprise throughout the three tax periods, would benefit through the imposition of tax only on the income, after deduction of losses and allowance of credits of the entire commonly owned enterprise. In other words, the tax saving was produced by losses suffered by and credits belonging to the plaintiff and can be justified only because throughout the three tax periods the plaintiff and defendants were affiliated and under the same common ownership. It was the plaintiff

and its stockholders who were intended to be benefited by the provisions of the Internal Revenue Code permitting affiliated corporations under common ownership to file consolidated returns and combine their income and losses and credits. To allow the defendants to keep the tax saving would be inconsistent with the basic objective of Congress and would distort the purpose of Congress in allowing such losses and credits as deductions in consolidated returns.

On the other hand, to allocate the abated taxes amounting to \$17,511,065.25 to the plaintiff in mitigation of its losses would be to carry out the purpose of Congress in permitting the filing of consolidated income and excess profits tax returns, and to the extent of such mitigation of the plaintiff's losses there will be relief from a forfeiture which equity abhors and by the same judicial action there will be the avoidance of an unjust enrichment of defendants which would offend basic equitable principles and shock the conscience of this Court.

The plaintiff invokes the rule fundamental in the interpretation of all Congressional legislation that where one interpretation leads to unjust, unreasonable and improper results and another interpretation equally admissible leads to a result which conforms to a just, reasonable and defensible legislative intent the latter interpretation is imperative.

Ninth: That during the three taxable periods the plaintiff had no taxable income and it sustained losses of \$73,113,079.01 which it had the right

to carry back to the years 1941 and 1942 and to carry forward to the years 1944 and 1945 as an offset against any taxable income for such years. During the three tax periods plaintiff also had large excess profits credits and credit carry-overs and carry-backs which it could utilize to offset any future excess profits it might have. The defendants had large taxable net incomes during each of the three tax periods as follows:

	1942	1943	Jan.-Apr. 1944
Western Pacific Railroad Co.	\$10,806,257.38	\$18,191,914.49	\$2,975,142.13
Sacramento Northern Railway	7,424.36	129,242.17	(192,955.89)
Tidewater Southern Railway	139,767.58	49,704.07	9,484.16
Deep Creek Railroad Co.	None	None	None
Western Realty Co.	(3,612.17)	(595.64)	1,197.67
Standard Realty & Development Co.	None	11,479.88	161.58
Delta Finance Co.	1,397.67	3,624.60	(157.66)

on which as separate taxpayers they incurred income and excess profits tax liabilities in an amount aggregating not less than \$21,712,886.79.

The plaintiff and the defendants, as affiliated corporations, had a right to file consolidated income and excess profits tax returns during the three tax periods the effect of which would be to consolidate the net incomes and losses and credits of the group with taxes imposed only on the resulting consolidated net income and consolidated excess profits net income and such filing of consolidated income and excess profits tax returns would eliminate all or substantially all of the separate tax liabilities of

the defendants. In the ordinary case of filing consolidated returns any consequent benefit would inure to the common parent through its proprietary interest, but since the plaintiff herein lost its proprietary interest in and managerial control of the defendants prior to the filing of the consolidated income and excess profits tax returns and prior to the settlement with the Government of the tax liability for the three taxable periods, the benefits could no longer inure to it unless the defendants are required to account nor could plaintiff alone bring about the filing of consolidated returns. Unless it receive the benefit resulting to the Affiliated Group from filing consolidated returns, the plaintiff could derive nothing but detriment from joining in consolidated returns; the plaintiff made itself jointly and severally liable for any tax liability of the group by joining in the consolidated income and excess profits tax returns and it deprived itself of the valuable right to use for its own exclusive benefit its own excess profits credits and net operating losses by carrying forward such credits and losses against future income it might have during the taxable periods in the years 1944 and 1945. The plaintiff had the right to file separate returns for the three tax periods and thus avoid the liabilities and the detriment to its individual interest entailed by joining in the consolidated income and excess profits tax returns. If the plaintiff had elected to file separate returns during the three tax periods the income and excess profits tax liability of the defendants which they would in such event

have been required to discharge by cash payment would have been not less than \$21,712,886.79.

The plaintiff had no right or power as parent corporation to cause the defendants to consent to the filing of consolidated income and excess profits tax returns because of the reorganization proceedings. At the special instance and request of the defendants and the Trustees in the reorganization proceedings acting for the defendants the plaintiff, however, consented to the filing on its behalf of consolidated income and excess profits tax returns with defendants for each of the three tax periods and thereby at the Trustees and defendants special instance and request surrendered and transferred to defendants its right to utilize for its own exclusive benefit the losses of \$73,113,079.01 and its excess profits credit and the defendants used such rights to their great benefit and advantage to discharge their federal income and excess profits tax liabilities for the said periods. The benefit conferred upon the defendants by the discharge of its tax liability at its request amounted to \$17,511,065.25.

The defendants are obligated in equity and good conscience to account for and pay to the plaintiff the tax saving in the amount of \$17,511,065.25 held by the defendants without right and solely as constructive trustees for the plaintiff.

Tenth: The defendants or said Trustees for the defendants presented the consolidated income and excess profits tax returns for signature to the plaintiff for each of the three tax periods through James K. Polk, tax counsel with the firm of Whitman,

Ransom, Coulson & Goetz which firm of attorneys had been counsel for both plaintiff and defendants prior to the reorganization, and for the Trustees in the reorganization. The same firm of attorneys were also counsel for the James Foundation of New York, Inc., which was not merely a stockholder and creditor of the plaintiff but was as well a creditor of the defendant, The Western Pacific Railroad Company, both prior to and during the reorganization. As a consequence of the reorganization and of heavy purchases of securities of said defendant during the progress of the reorganization the James Foundation became predominantly interested as a bondholder in the defendants and thus adversely interested to the plaintiff in this tax matter. The defendants continued to employ the same common counsel with the plaintiff after the defendants, The Western Pacific Railroad Company and its subsidiaries, were in reorganization and their interests were no longer the same as those of the plaintiff. Plaintiffs officers and general counsel were not conversant with tax matters and relied completely on said tax counsel to protect its rights and more particularly relied on such common tax counsel to advise them if and when any diversity of interest affecting the tax rights of the parties arose so that separate counsel could be retained to protect separate interests. The plaintiff had a right to be advised of its separate rights with respect to the utilization of its losses and excess profits credits and of the fact that it had the right to require an allocation to it of the tax benefit resulting to the

defendants from the use of the plaintiff's tax losses and excess profits credits to discharge the federal income and excess profits tax liabilities of the defendants; the defendants fully realized and had knowledge of this but nevertheless caused the consolidated income and excess profits tax returns to be prepared for each of the three tax periods and presented to the plaintiff through the common tax counsel for signature as a mere matter of routine without disclosing to the plaintiff the adversity in tax interests of the parties or the plaintiff's legal position and rights in the matter. The entire tax matter for the three tax periods was handled by the defendants through the common tax counsel in entire disregard of plaintiff's individual rights and interests and on the basis of effecting the greatest possible tax economies for defendants through the utilization of plaintiff's tax rights until final settlement with the Bureau of Internal Revenue on August 13, 1947, and this was done without consulting or informing the plaintiff as to the progress of the matter until the proposed settlement was presented to the plaintiff through the common tax counsel for ratification and signature. In the settlement with the Bureau of Internal Revenue the defendants waived a claim for refund of consolidated income taxes paid for the year 1942 in the amount of \$4,201,821.54 based upon a carry-back of the plaintiff's 1943 tax losses which amount was payable to the plaintiff by the United States Treasury. The additional income and excess profits tax liabilities of the defendants for the three tax periods

discharged, as confirmed by said settlement, by the filing of the consolidated income and excess profits tax returns and the transfer thereby of the plaintiff's losses and excess profits credits to the use of the defendants was not less than \$17,511,065.25.

The defendants are obligated in equity and good conscience to account for and pay to the plaintiff the tax saving in the amount of \$17,511,065.25 held by the defendants without right but solely as constructive trustees for the plaintiff.

Eleventh: That the obligation of the Trustees of the defendants, The Western Pacific Railroad Company and its subsidiaries, to account for and pay to the plaintiff the aforesaid tax savings was an obligation incurred by the Trustees in their operation of the debtor's estate and was an obligation assumed by the defendant, The Western Pacific Railroad Company, under Orders of this Court in the Bankruptcy Proceeding and properly chargeable against the properly payable out of moneys transferred to the defendant, The Western Pacific Railroad Company, by said Trustees, which moneys vastly exceeded the amount of working capital contemplated by the Plan of Reorganization and the \$17,511,065.25 included therein representing tax savings realized solely by reason of the misfortune of the plaintiff and the utilization by said defendant of plaintiff's rights and which in equity and good conscience belong wholly to the plaintiff and are held by the defendant, The Western Pacific Railroad Company, without any beneficial interest

therein but solely as custodian or trustee for the plaintiff.

Twelfth: In answering the plaintiff's Bill of Complaint the defendants set up and interpose as a bar to the assertion by the plaintiff of its equitable right to an allocation of the tax savings amounting to \$17,511,065.25 the Decree or Order of this Court dated March 28, 1946, which Decree or Order this plaintiff avers is inapplicable to this proceeding and is not a bar to enforcement of the cause of action set up in the Bill of Complaint for the following reasons, among others:

1. The cause of action set up in the Bill of Complaint is in the category of those expressly excepted from the operation of said Decree or Order.

2. The cause of action set up in the Bill of Complaint is in the nature of an equitable accounting for moneys in the custody of but not belonging to the defendant, The Western Pacific Railroad Company, and held by it without beneficial interest therein and solely as custodian or Trustee for the plaintiff.

3. At the time of the entry of said Decree or Order the plaintiff's rights as proprietary parent of the Affiliated Group were inchoate and unliquidated and had not become fixed, liquidated and justiciable until the compromise agreement with the Government hereinbefore mentioned.

4. The aforesaid tax savings although in the

custody of the defendant, The Western Pacific Railroad Company, are held by it in a fiduciary capacity and will be so held until final allocation thereof is made precisely as is the plaintiff in a fiduciary position with respect to the tax refund moneys in its possession in accordance with the Stipulation annexed hereto as Exhibit B. The inchoate right of the plaintiff to an allocation of the aforesaid tax savings resulting from the utilization in the excess profits and income tax returns for the three tax periods of its deductible losses was an unliquidated claim against the Trustees of the estate of the defendant, The Western Pacific Railroad Company, who had requested the plaintiff to file said excess profits and income tax returns on a consolidated basis and who subsequently transferred the entire trust res including moneys representing such tax savings to the defendant, The Western Pacific Railroad Company, subject to all liabilities of said Trustees, one of which was their obligation to the plaintiff to account to it for the tax savings thereafter determined to have resulted from such utilization of the plaintiff's deductible losses.

5. In addition to the foregoing reasons the plaintiff avers that said Decree or Order if deemed applicable to the cause of action set forth in the Bill of Complaint should be set aside or modified so as to exempt said cause of action from its operation for the following further reasons:

(a) The firm of Whitman, Ransom, Coulson & Goetz and James K. Polk, a member thereof, at

the instance of the Trustees, one of whom was the Chief Executive Officer of the plaintiff, were appointed tax counsel for the Trustees and for the plaintiff. Said firm were also counsel for the James Foundation of New York, Inc. Robert E. Coulson, a member of said firm, was a member of the Reorganization Committee of the defendant, the Western Pacific Railroad Company, and said firm was counsel for said Reorganization Committee when said Decree or Order was procured from this Court. Said James Foundation of New York, Inc., owned preferred stock and common stock in the plaintiff as well as being a large secured creditor of the plaintiff. Said James Foundation of New York, Inc., also owned claims against, and securities of the defendant, The Western Pacific Railroad Company. As a consequence of said reorganization and of heavy purchases of securities of said Railroad Company during the progress of the reorganization said James Foundation of New York, Inc., became predominantly interested as bondholder and stockholder of the defendant, The Western Pacific Railroad Company, and by reason of said predominance became adversely interested to the plaintiff.

(b) At the outset of the legal relationship of the firm of Whitman, Ransom, Coulson & Goetz to the Affiliated Group the interests of the parties were identical since the plaintiff was the holder of all capital stock of the defendant, The Western Pacific Railroad Company; but when a reorganization was proposed eliminating the stock interest therein of the plaintiff, which eventually took place,

there was always a potentiality and later an actuality of adverse and conflicting interests between the plaintiff and the defendants. The plaintiff's Officers and General Counsel were not experienced in or conversant with tax matters and wholly relied upon said firm of Whitman, Ransom, Coulson & Goetz and said James K. Polk to keep it fully informed of its rights, it being well established that where attorneys represent conflicting interests there is a fiduciary responsibility on their part to see that no rights or claims are neglected and that full disclosures are made to all parties and to all judicial and administrative tribunals. In the discharge of their duties as tax counsel for all parties concerned said firm of Whitman, Ransom, Coulson & Goetz and said James K. Polk performed in the manner following:

i. They prepared excess profits and income tax returns for the three tax periods and caused the same to be executed by the plaintiff without pointing out to the plaintiff that the plaintiff as a member of the Affiliated Group was assuming several responsibility for all tax liabilities of the Affiliated Group and was acquiring a right to an equitable determination or allocation of the tax benefits, if any, arising from the filing of said Returns on a consolidated basis;

ii. They entered into negotiations with the Commissioner of Internal Revenue for a settlement of the tax liabilities of the Affiliated Group without informing the plaintiff thereof;

iii. On February 11, 1947, they transmitted to the Commissioner of Internal Revenue a formal written offer of settlement for tax liabilities without informing the plaintiff of said offer;

iv. They failed to advise the plaintiff corporation of substantial tax benefits implicit if the deductible losses of the plaintiff were accepted by the Government as set up in said excess profits and income tax returns;

v. Throughout their representation of the plaintiff they failed to advise the plaintiff as to what were its rights as a member of the Affiliated Group filing said Returns on a consolidated basis and failed to advise it of its right to an allocation of tax benefits in mitigation of its losses; and

vi. Finally, they failed to advise the Court in the reorganization proceeding at the time of their submission of the Decree or Order dated March 28, 1946, of their various conflicting interests and failed to advise the Court that there would be a right in the plaintiff to bring an action for an equitable allocation of tax benefits if the excess profits and income tax returns were accepted by the Government which right of action might be barred by said Decree or Order resulting in irreparable injury to the plaintiff and in the unjust enrichment of another of their clients, namely, the James Foundation of New York, Inc.

For all of the foregoing reasons the plaintiff alleges that said Decree or Order of March 28, 1946, if susceptible to the construction sought to be placed upon it by the defendant, The Western

Pacific Railroad Company, should be modified so as to exempt this particular cause of action from its operation or should be set aside in its entirety as having been improvidently entered.

The plaintiff does not aver that in so conducting themselves the firm of Whitman, Ransom, Coulson & Goetz or James K. Polk were aware of wrongdoing or consciously disregarded the interests of the plaintiff. It is quite possible that their actions or inaction were inadvertent and that said firm or James K. Polk were unaware or unconvinced of the plaintiff's rights; but whether inadvertent or intentional their disregard of the plaintiff's rights and their failure to inform the Court thereof, at a time when the diversity of interest was apparent, would render the operation of said Decree or Order as a bar to the plaintiff's cause of action grossly inequitable and wholly inadmissible.

Thirteenth: That the plaintiff verily believes and alleges that the whole of said sum of \$17,511,065.25 is due and owing to it and that there are no valid offsets or counterclaims there against or against the plaintiff on the part of any of the defendants but if any such claims do exist or are thought to exist by any of the defendants such claims should be required to be filed and adjudicated in this proceeding to the end that all accounts between the plaintiff and its former affiliated companies may be judicially settled.

Fourteenth: Reference herein to the defendants includes the corporations named herein as defend-

ants whether acting through their corporate officers or authorized agents or through Trustees during the period of trusteeship.

Wherefore, the plaintiff demands judgment in accordance with the prayer of the Bill of Complaint and specifically that the defendant, The Western Pacific Railroad Company, be adjudged and decreed to be accountable to the plaintiff for the sum of \$17,511,065.25 and that judgment in favor of the plaintiff and against the defendant, The Western Pacific Railroad Company, be rendered for said sum; that the accounts of the plaintiff with all or any of its former affiliated companies may be judicially settled and the plaintiff discharged from any liabilities in respect thereof; and that the plaintiff be accorded such other and further relief as shall be agreeable to the usages and practices of equity and the Rules of Civil Procedure and as to this Court shall seem meet.

THE WESTERN PACIFIC
RAILROAD CORPORATION.

By /s/ LEROY R. GOODRICH,
Its Attorney.

Of Counsel:

FRANK C. NICODEMUS, JR.,
A. PERRY OSBORN,
NORRIS DARRELL.

[Endorsed]: Filed December 17, 1947.

[Exhibits A, B and C attached to the Supplemental Bill of Complaint are identical to the Stipulation and Agreement between Plaintiff and Defendant Relating to Agreement with the Bureau of Internal Revenue. See pages 168 to 175 inclusive.]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE WESTERN
REALTY COMPANY

Comes now defendant The Western Realty Company, and answering plaintiff's supplemental bill of complaint, respectfully shows and alleges:

I.

Denies each and every allegation contained in paragraph "First," except it is informed and believes and therefore admits that the consolidated income and excess profits tax returns filed by plaintiff and its affiliated companies for the years 1942, 1943 and the first four months of 1944 had not been finally audited by the Commissioner of Internal Revenue at the time of the filing of the bill of complaint herein and that commencing on February 11, 1947, negotiations were entered into with the Commissioner of Internal Revenue to settle the tax liabilities of plaintiff and its affiliated companies and on February 11, 1947, and on May 19, 1947, offers to settle the tax liabilities of plaintiff and its affiliated companies were made in the words and figures of Exhibit A annexed to the supplemental bill of complaint and Exhibit 1 hereto annexed.

II.

Denies each and every allegation contained in paragraph "Second," except it is informed and believes and therefore admits that offers of settlement were made on behalf of plaintiff and its affiliated companies in the words and figures of Exhibit A annexed to the supplemental bill of complaint and Exhibit 1 hereto annexed.

III.

Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "Third," except it denies that plaintiff would be the beneficiary of any tax savings.

IV.

Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "Fourth," except it admits that it entered into a stipulation with plaintiff and others in the words and figures of Exhibit B annexed to the supplemental bill of complaint.

V.

Denies each and every allegation contained in paragraph "Fifth," except it is informed and believes and therefore admits that under date of August 13, 1947, the Commissioner of Internal Revenue addressed a letter to plaintiff and its affiliated companies, copy of which is annexed to the supplemental bill of complaint as Exhibit C.

VI.

Denies each and every allegation contained in paragraph "Sixth," except it is informed and believes and therefore admits that under date of August 26, 1947, the Commissioner of Internal Revenue addressed a letter to plaintiff and its affiliated companies, copy of which is annexed to the supplemental bill of complaint as Exhibit D.

VII.

Denies each and every allegation contained in paragraph "Seventh," except it denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff employed Lybrand, Ross Bros. & Montgomery to make the calculations alleged, that Lybrand, Ross Bros. & Montgomery did, in fact, make such calculations, and it is informed and believes and therefore admits that no other or additional payments were made to the Collector of Internal Revenue by plaintiff and its affiliated companies for the years 1942, 1943 and the first four months of 1944 than the \$4,201,821.54 paid by the Trustees in Reorganization of defendant The Western Pacific Railroad Company for the year 1942.

VIII.

Denies each and every allegation contained in paragraph "Eighth," except it admits that from time to time the Internal Revenue Code and the several Revenue Acts in force from 1917 to 1938 have provided that affiliated companies meeting the

requirements therein laid down may file tax returns on a consolidated basis and begs leave upon the trial of the action to refer to the pertinent provisions of the Internal Revenue Code and Regulations with respect to the rights, duties and liabilities of affiliated companies having the right to and availing themselves of the privilege of filing tax returns on a consolidated basis.

IX.

Denies each and every allegation contained in paragraph "Ninth," except it is informed and believes and therefore admits that plaintiff had no taxable income during the years 1942, 1943 and the first four months of 1944 and sustained substantial losses in the year 1943 which it had the right to carry back and to carry forward as an offset against taxable income, that certain of the defendants had taxable net income during the years 1942, 1943 and the first four months of 1944, that plaintiff and defendants, as affiliated corporations, had the right to and did file consolidated income and excess profits tax returns and utilized certain losses of plaintiff in the returns for the years 1942, 1943 and the first four months of 1944.

X.

Denies each and every allegation contained in paragraph "Tenth," except it is informed and believes and therefore admits that James K. Polk was and is a specialist in tax matters and was and is a member of the firm of Whitman, Ransom, Coulson & Goetz, counsel for The James Foundation of New York, Inc., a stockholder and creditor of plaintiff

and a creditor of defendant prior to and during the reorganization, and that James K. Polk and Whitman, Ransom, Coulson & Goetz were employed to advise and did advise the Trustees in Reorganization of defendant The Western Pacific Railroad Company in tax matters.

XI.

Denies each and every allegation contained in paragraph "Eleventh."

XII.

Denies each and every allegation contained in paragraph "Twelfth," and begs leave upon the trial of the action to refer to the answers interposed by defendants to the bill of complaint for a true and correct statement of the allegations thereof, and it is informed and believes and therefore admits that Whitman, Ransom, Coulson & Goetz and James K. Polk were employed to advise the reorganization trustees of defendant The Western Pacific Railroad Company on tax matters, that Whitman, Ransom, Coulson & Goetz were counsel for The James Foundation of New York, Inc., that Robert E. Coulson, a member of said firm, was a member of the reorganization committee of defendant The Western Pacific Railroad Company, that Whitman, Ransom, Coulson & Goetz were counsel for such reorganization committee, that The James Foundation of New York, Inc., was a stockholder and creditor of plaintiff and of defendant The Western Pacific Railroad Company and that James K. Polk conducted negotiations with the Commissioner of Internal Revenue

leading up to the settlement of the tax liabilities of the affiliated group for the years 1942, 1943 and the first four months of 1944.

XIII.

Denies each and every allegation contained in paragraph "Thirteenth."

For a First Separate and Complete defense, defendant alleges:

XIV.

The bill of complaint and the supplemental bill of complaint fail to state a claim against defendant upon which relief can be granted.

Wherefore, defendant demands judgment that the bill of complaint and the supplemental bill of complaint be dismissed as to it, together with costs and disbursements.

PILLSBURY, MADISON &
SUTRO,

EUGENE M. PRINCE,
EVERETT A. MATHEWS,
HOMER G. ANGELO,

WHITMAN, RANSOM,
COULSON & GOETZ,

MILBANK, TWEED, HOPE &
HADLEY,

By /s/ EVERETT A. MATHEWS,
Attorneys for Defendant The
Western Realty Company.

EXHIBIT 1

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N.Y.

May 19, 1947.

Mr. C. R. Krigbaum
Internal Revenue Agent in Charge
225 Broadway
New York, N.Y.

The Western Pacific Railroad Corporation
and Affiliated Corporations 1942, 1943 and
1944 Federal Income Taxes

Dear Sir:

Reference is made to the conference held in your office May 6th with regard to the tax liabilities of The Western Pacific Railroad Corporation and its affiliated companies for the taxable years 1942, 1943 and 1944.

At this conference an agreed basis of settlement of the tax liabilities involved was reached and this letter contains the written undertaking of the taxpayers effectuating the settlement.

The taxpayer on behalf of itself and its affiliated subsidiaries agrees to settle and determine the tax liabilities of said corporation for the taxable years 1942, 1943, and 1944 in the amounts shown on the returns as filed. This proposal of settlement accordingly relates to the consolidated returns filed for the calendar years 1942 and 1943 and 1944, in which

said return for 1944 The Western Pacific Railroad Corporation included therein its subsidiaries for the period January 1, 1944 to April 30, 1944, during which period affiliation existed. This settlement does not relate to or affect the tax liability of the subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated.

As part of the settlement The Western Pacific Railroad Corporation consents to the rejection of the pending claim for refund of 1942 taxes and further agrees not to sue upon said claim or file other or further claims in respect of 1942 taxes on any ground whatsoever. It is also stipulated that The Western Pacific Railroad Corporation on behalf of itself and its affiliated subsidiaries will, if this settlement is accepted, execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal Revenue for the purpose of effectuating the settlement.

The settlement reached with your office is agreed to without prejudice, however, to any rights or claims of the parties in the event the settlement is not accepted by the Commissioner of Internal Revenue.

Authority for settlement of the tax liabilities of the above-named taxpayers by the undersigned is

contained in power of attorney heretofore filed with your office.

Respectfully,

THE WESTERN PACIFIC
RAILROAD CORPORATION,

JAMES K. POLK,
Attorney-in-Fact.

Receipt of Copy Attached.

[Endorsed]: Filed June 14, 1948.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS THE WESTERN
PACIFIC RAILROAD COMPANY, SACRA-
MENTO NORTHERN RAILWAY, TIDE-
WATER SOUTHERN RAILWAY COM-
PANY, DELTA FINANCE CO., LTD., AND
STANDARD REALTY AND DEVELOP-
MENT COMPANY TO PLAINTIFF'S SUP-
PLEMENTAL BILL OF COMPLAINT

Come Now defendants The Western Pacific Rail-
road Company, Sacramento Northern Railway,
Tidewater Southern Railway Company, Delta Fin-
ance Co., Ltd., and Standard Realty and Develop-
ment Company and, without waiving any objections
to plaintiff's Supplemental Bill of Complaint (here-
inafter for convenience referred to as the Supple-
mental Complaint) and specifically reserving the
right to make objections to the propriety of said

Supplemental Complaint and to the filing thereof, by way of answer thereto admit, deny and allege as follows:

I.

Deny all of the allegations of paragraph first of the Supplemental Complaint, except the following which are admitted: At the time of the filing of the Bill of Complaint herein the consolidated income and excess profits tax returns of the plaintiff and its affiliated companies (hereinafter for convenience called the Affiliated Group) for the years 1942 and 1943 and the period January 1, 1944, to April 30, 1944, had not been finally audited and accepted by the Commissioner of Internal Revenue.

II.

Admit the allegations of paragraph second of the Supplemental Complaint.

III.

Answering the allegations of paragraph third of the Supplemental Complaint, these defendants allege that they are without knowledge or information sufficient to form a belief with regard to whether or not plaintiff had been informed that the said offer of settlement, Exhibit A to the Supplemental Complaint (being also set forth in Exhibit A to the stipulation and agreement filed in this cause September 5, 1947) was to be submitted to the Commissioner of Internal Revenue in advance of the transmission thereof to said Commissioner on February 11, 1947, and except as last above stated deny each and every allegation contained in paragraph third

of said Supplemental Complaint. Further answering the allegations of said paragraph third, allege that negotiations with the Commissioner of Internal Revenue to settle the tax liabilities of these defendants to the United States were commenced February 11, 1947, and in connection with such negotiations, offers for settlement of the tax liability to the United States were made February 11, 1947, and May 19, 1947, in the words and figures of said Exhibit A and Exhibit 1 annexed to this answer.

IV.

Answering the allegations of paragraph fourth of the Supplemental Complaint, allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained except these defendants admit that they entered into a stipulation and agreement in writing with the plaintiff and the defendant, Western Realty Company, which said stipulation was filed in this cause September 5, 1947, and is the stipulation mentioned in paragraph III of this Answer.

V.

Deny each and every allegation contained in paragraph fifth of the said Supplemental Complaint except these defendants admit that under date of August 13, 1947, the Commissioner of Internal Revenue addressed to the plaintiff and affiliated companies a letter dated August 13, 1947, copy of which is annexed to the Supplemental Complaint as Exhibit C thereto (being also set forth in Exhibit A

to the aforesaid stipulation filed in this cause September 5, 1947).

VI.

Deny each and every allegation contained in paragraph sixth of the said Supplemental Complaint except that these defendants admit that under date of August 26, 1947, the Commissioner of Internal Revenue addressed a letter to plaintiff and affiliated companies, copy of which is annexed to the Supplemental Complaint as Exhibit D thereto (being also set forth in Exhibit A to the aforesaid stipulation filed in this cause September 5, 1947).

VII.

Deny each and every allegation contained in paragraph seventh of the Supplemental Complaint except these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff employed Lybrand, Ross Bros. & Montgomery to make calculations alleged and that they in fact made such calculations, and except that these defendants admit that no payments were made to the Commissioner of Internal Revenue by these defendants or any of them or by the plaintiff for income and excess profits taxes for the years 1942, 1943 and the first four months of 1944 other than the \$4,201,821.54 paid by the Reorganization Trustees in the reorganization of defendant, The Western Pacific Railroad Company, for the year 1942.

VIII.

Deny each and every allegation contained in paragraph eighth of said Supplemental Complaint except these defendants admit that from time to time the laws and statutes relating to Federal income and excess profits taxes and regulations thereunder have made provisions with respect of the filing of consolidated income and excess profit tax returns.

IX.

Deny each and every allegation contained in paragraph ninth of the Supplemental Complaint except these defendants are informed and believe and therefore admit that plaintiff had no taxable income during the years 1942, 1943 and 1944, nor in the first four months of 1944, and that plaintiff sustained losses in each of the calendar years 1942, 1943 and 1944 and that certain of these defendants had taxable net income during the years 1942, 1943 and the first four months of 1944 and that plaintiff and defendants as companies affiliated during said years and portion of year had the right to and did file consolidated income and excess profits tax returns for said years, 1942, 1943 and 1944 (these defendants having been included in said consolidated return for the year 1944, as to the first four months of that year) and that a substantial portion of the loss of the plaintiff in the year 1943 was carried forward in the said consolidated income and excess profits tax returns for the year 1944.

X.

These defendants deny each and every allegation contained in paragraph tenth of said Supplemental Complaint except they admit that James K. Polk was and is a member of the firm of Whitman, Ransom, Coulson & Goetz, counsel for The James Foundation of New York, Inc., which was a stockholder and creditor of plaintiff and a creditor of defendant, The Western Pacific Railroad Company, prior to and during the reorganization of said last named Company, and that the said Polk and the said firm were employed to advise and did advise the Reorganization Trustees in the reorganization of said last named defendant in tax matters.

XI.

Deny each and every allegation contained in paragraph eleventh of said Supplemental Complaint.

XII.

Answering the allegations of paragraph twelfth of the Supplemental Complaint,—

(a) Admit and allege that in answering plaintiff's Bill of Complaint herein these defendants have set up and do interpose as a bar to the assertion by plaintiff of its pretended claim the decree and order of the Bankruptcy Court in said Reorganization Proceedings dated March 28, 1946; that the firm of Whitman, Ransom, Coulson & Goetz and James K. Polk, a member thereof, were employed by the aforesaid Reorganization Trustees as tax counsel to advise regarding the preparation

and filing of consolidated income and excess profits tax returns for the years 1942 and 1943 and the first four months of 1944; that said firm was counsel for The James Foundation of New York, Inc.; that Robert E. Coulson, a member of said firm, was nominated jointly by A. C. James Co. and Railroad Credit Corporation to be a member of the Reorganization Committee of defendant The Western Pacific Railroad Company and was appointed as such by the Interstate Commerce Commission and the Bankruptcy Court; that said firm was counsel for said Reorganization Committee; that The James Foundation of New York, Inc., was a stockholder and creditor of plaintiff and was a secured creditor of the debtor in reorganization, and from and after January 1, 1945, has been and is a stockholder of defendant The Western Pacific Railroad Company; that said James K. Polk conducted negotiations with the Bureau of Internal Revenue leading up to the settlement that was made in August, 1947, of the income and excess profits tax liabilities of the affiliated group for the years 1942 and 1943 and the first four months of 1944, said settlement being shown by the aforesaid stipulation, filed in this cause September 5, 1947; and that on April 2, 1947, and thereafter said Polk fully advised plaintiff with regard thereto and that thereafter plaintiff approved and agreed to said settlement.

(b) Except as hereinbefore admitted and alleged, deny each and every allegation contained in

paragraph twelfth of said Supplemental Complaint.

XIII.

Deny each and every allegation contained in paragraph thirteenth of the Supplemental Complaint.

XIV.

Deny each and every allegation contained in paragraph fourteenth of the Supplemental Complaint.

XV.

Further answering said Supplemental Complaint, these defendants refer to and by such reference incorporate herein all the allegations contained in their answer and counterclaim on file herein with the same force and effect as if set forth in full and repeated in this answer to said Supplemental Complaint.

XVI.

For a further and separate defense to the plaintiff's Complaint and Supplemental Complaint herein, these defendants allege that said Complaint and Supplemental Complaint and each cause of action therein fail to state a claim against these defendants or any of them upon which relief can be granted.

XVII.

For a further and separate defense to the plaintiff's Complaint and Supplemental Complaint, these defendants allege that this Court, without bankruptcy jurisdiction, is without jurisdiction or power to modify or set aside, in whole or in part, the orders, judgments and decrees made by the

Bankruptcy Court in the said reorganization proceedings or any thereof.

XVIII.

For a further and separate defense to the plaintiff's Complaint and Supplemental Complaint, these defendants allege that neither said Complaint nor said Supplemental Complaint name as defendants indispensable and necessary parties.

XIX.

At all times from August 2, 1935, to March 28, 1946, the rights of plaintiff against the defendant, The Western Pacific Railroad Company, and the Reorganization Trustees were before this Court for adjudication in the reorganization proceeding. Plaintiff could have obtained in the reorganization proceeding an express adjudication of the claims which are presented in this action. Failure of plaintiff to do so renders said claims forever barred under the principles of *res adjudicata*.

XX.

At no time before the institution of this action did plaintiff or any one in behalf of plaintiff in any way assert the claims which are the subject of this action. If they had asserted these claims promptly, the defendant, The Western Pacific Railroad Company, the Reorganization Trustees and all parties to the reorganization proceeding could have applied to the Court conducting the reorganization for an order directing plaintiff to file the consolidated returns for 1942, 1943 and 1944 and the refund claim

for 1942 without any charge by or in behalf of the plaintiff for compensation to it. If that application had been denied, the Reorganization Trustees and the defendants could then have elected to file separate income tax returns and to avail themselves of the rights, privileges, options and advantages belonging to the persons who pay taxes to the Federal Government. The Reorganization Trustees and the defendants could have taken steps to improve their tax position, among other things, by taking advantage of the tax benefit which would arise from a determination of the insolvency of the defendant, Sacramento Northern Railway. The Reorganization Trustees and the defendants have, in reliance of the silence of the plaintiff, changed their position to their detriment. Plaintiff is therefore estopped from asserting its claims. It is also estopped from maintaining in this action a position inconsistent with the position plaintiff maintained in the reorganization proceedings. Plaintiff is further precluded from maintaining its claims by reason of the fact that the concurrence of each member of the affiliated group was necessary in order that consolidated returns might be filed. The claims of plaintiff to the alleged tax saving are therefore unjust and unconscionable because plaintiff's claim to the alleged saving would in no event be better than the claim of each of the defendants.

XXI

These defendants allege that by reason of the circumstances set forth in this Answer and in their

Answer to the plaintiff's Complaint herein the claims of plaintiff are barred by each of the following defenses: Discharge in bankruptcy pursuant to Section 77 of the Bankruptcy Act, res adjudicata, estoppel, laches, failure of consideration, illegality, statute of limitations and waiver.

Wherefore, these defendants pray for the order, judgment and decree of this Honorable Court

1. Declaring and determining that defendant, The Western Pacific Railroad Company, is the sole owner of and is exclusviely entitled to the reserve fund and refund claim mentioned in its Answer to plaintiff's Complaint hereunder, and quieting the right and title to said defendant therein and there-to against the claims of plaintiff and all other parties to this cause and restraining and enjoining plaintiff and all other parties to this suit other than defendant, The Western Pacific Railroad Company, from instituting or prosecuting claims thereto.

2. Declaring and determining that plaintiff has no rights or claims against these defendants or any of them for or on account of any matter or thing averred in planitiff's Complaint or Supplemental Complaint herein.

3. For defendant's costs of suit herein and all such other and further relief that may be meet and equitable in the premises.

Dated: June 22, 1948.

THE WESTERN PACIFIC RAILROAD COM-
PANY,

SACRAMENTO NORTHERN RAILWAY,
TIDEWATER SOUTHERN RAILWAY COM-
PANY,
DELTA FINANCE CO., LTD.,
STANDARD REALTY AND DEVELOPMENT
COMPANY,

By /s/ ALLAN P. MATTHEW,
JAMES D. ADAMS,
ROBERT L. LIPMAN,
BURNHAM ENERSEN,
Their Attorneys.

EXHIBIT 1

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N. Y.

May 19, 1947

Mr. C. R. Krigbaum
Internal Revenue Agent in Charge
225 Broadway
New York, N. Y.

The Western Pacific Railroad Corporation
and Affiliated Corporations, 1942, 1943 and
1944 Federal Income Taxes.

Dear Sir:

Reference is made to the conference held in your
office May 6th with regard to the tax liabilities of
The Western Pacific Railroad Corporation and its

affiliated companies for the taxable years 1942, 1943 and 1944.

At this conference an agreed basis of settlement of the tax liabilities involved was reached and this letter contains the written undertaking of the taxpayers effectuating the settlement.

The taxpayer on behalf of itself and its affiliated subsidiaries agrees to settle and determine the tax liabilities of said corporation for the taxable years 1942, 1943 and 1944 in the amounts shown on the returns as filed. This proposal of settlement accordingly relates to the consolidated returns filed for the calendar years 1942 and 1943 and 1944, in which said return for 1944 The Western Pacific Railroad Corporation included therein its subsidiaries for the period January 1, 1944, to April 30, 1944, during which period affiliation existed. This settlement does not relate to or affect the tax liability of the subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated.

As part of the settlement The Western Pacific Railroad Corporation consents to the rejection of the pending claim for refund of 1942 taxes and further agrees not to sue upon said claim or file other or further claims in respect of 1942 taxes on any ground whatsoever. It is also stipulated that The Western Pacific Railroad Corporation on behalf of itself and its affiliated subsidiaries will, if this settlement is accepted, execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal

Revenue for the purpose of effectuating the settlement.

The settlement reached with your office is agreed to without prejudice, however, to any rights or claims of the parties in the event the settlement is not accepted by the Commissioner of Internal Revenue.

Authority for settlement of the tax liabilities of the above-named taxpayers by the undersigned is contained in power of attorney heretofore filed with your office.

Respectfully,

THE WESTERN PACIFIC
RAILROAD CORPORATION,

JAMES K. POLK,
Attorney-in-Fact.

Receipt of copy attached.

[Endorsed]: Filed June 22, 1948.

[Title of District Court and Cause.]

STIPULATION FOR SUBSTITUTION OF
MEREDITH H. METZGER, FORMERLY
MEREDITH H. VAN KIRK, AS A PLAINTIFF
IN INTERVENTION

Pursuant to stipulation of the parties entered into at the pretrial conference herein on January 11, 1949, and upon the representation by counsel for in-

terveners that 8,200 shares of the preferred stock of plaintiff and defendant in intervention The Western Pacific Railroad Corporation out of the 11,468 shares alleged in the Complaint in Intervention herein to be held by plaintiff in intervention, Russell M. Van Kirk, now deceased, were distributed on or about January 17, 1949, to Meredith H. Metzger, formerly Meredith H. Van Kirk, widow of said decedent, in the estate of said decedent now pending before the Surrogate of the County of Monmouth, State of New Jersey, said decedent Russell M. Van Kirk having died in December, 1947, during the pendency of this action; that said Meredith H. Metzger is now the lawful owner and holder of 11,385 shares of said preferred stock of said Corporation including said 8,200 shares so distributed to her from the estate of her deceased husband and through the ownership of said shares either she or her deceased husband has been a stockholder of said Corporation continuously since on or about February 23, 1944; and that the said Meredith H. Metzger is now and continuously since some years prior to April 7, 1947, the date of the filing of said Complaint in Intervention herein, has been a citizen and resident of the State of New Jersey.

It Is Hereby Stipulated and Agreed by and between the respective parties hereto that the said Meredith H. Metzger, formerly Meredith H. Van Kirk, widow of said deceased plaintiff in intervention, Russell M. Van Kirk, shall be substituted as

'a plaintiff in intervention herein in the place and stead of the said Russell M. Van Kirk, deceased, as the owner and holder of his said shares, to wit, the 8,200 shares so distributed to her out of the estate of said decedent, and as the owner of a total of 11,385 shares of the preferred stock of said Corporation, subject to all prior proceedings had herein and to all claims and defenses heretofore raised by any of the parties hereto with the same force and effect as if she had been one of the original plaintiffs in intervention herein owning and holding 11,385 shares of the preferred stock of said Corporation and having been a stockholder of said Corporation continuously since on or about February 23, 1944; and that the requirements of Rule 25, FRCP, with respect to motion, notice of hearing and hearing are hereby waived.

Dated: January 27, 1949.

WEBSTER V. CLARK.
ROGERS AND CLARK,
DAVID FREIDENRICH,
JULIUS LEVY,
ABRAHAM L. POMERANTZ.
POMERANTZ, LEVY,
SCHREIBER & HAUDEK,

By /s/ WEBSTER V. CLARK,

Attorneys for Russell M. Van Kirk, Henry Offerman and J. S. Farlee & Co., Inc., a corporation, Plaintiffs in Intervention.

LEROY R. GOODRICH,
FRANK C. NICODEMUS, JR.,
A. PERRY OSBORN,
NORRIS DARRELL,
MAHLON DICKERSON,
BROBECK, PHLEGER &
HARRISON,

By /s/ MAHLON DICKERSON,

Attorneys for Plaintiff and Defendant in Inter-
vention, The Western Pacific Railroad Cor-
poration.

PILLSBURY, MADISON &
SUTRO,

EUGENE M. PRINCE,
EVERETT A. MATHEWS,
HOMER G. ANGELO.

WHITMAN, RANSOM, COUL-
SON & GOETZ,

MILBANK, TWEED, HOPE &
HADLEY.

By /s/ A. DONALD MacKINNON,

Attorneys for Defendant and Defendant in Inter-
vention, The Western Realty Company.

ALLAN P. MATTHEW,
JAMES D. ADAMS,
ROBERT L. LIPMAN,
BURNHAM ENERSEN,
McCUTCHEN, THOMAS,
MATTHEW, GRIFFITHS
& GREENE,

By /s/ JAMES D. ADAMS,

Attorneys for Defendants and Defendants in Intervention, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company.

ORDER

Pursuant to the foregoing stipulation and the stipulation entered into by the parties at the pre-trial conference herein on January 11, 1949, and good cause appearing therefor, it is hereby ordered that Meredith H. Metzger, formerly Meredith H. Van Kirk, the widow of the plaintiff in intervention, Russell M. Van Kirk, now deceased, and the distributee in the estate of said decedent of 8,200 shares of the preferred stock of plaintiff and defendant in intervention, The Western Pacific Railroad Corporation, owned and held by said decedent, be and she is hereby substituted as a plaintiff in intervention herein in the place and

stead of said decedent as the owner and holder of his said shares, subject to all prior proceedings had herein and to all claims and defenses heretofore raised by any of the parties hereto with the same force and effect as if she, the said Meredith H. Metzger, had been one of the original plaintiffs in intervention herein owning and holding 11,385 shares of the preferred stock of said Corporation and having been a stockholder of said Corporation continuously since on or about February 23, 1944.

Dated: January 28th, 1949.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed January 28, 1949.

[Title of District Court and Cause.]

OPINION

Goodman, District Judge.

Plaintiff, a former holding company, whose interest in its subsidiary had been finally declared valueless in the subsidiary's reorganization proceeding under § 77 of the Bankruptcy Act, has tendered the novel claim that it should be awarded, in equity, a part, if not all, of the subsidiary's income tax saving while in reorganization, resulting from the filing of consolidated corporate income tax returns.

A somewhat detailed history must be set down

in order to properly appraise the unique demand of plaintiff.

Plaintiff is The Western Pacific Railroad Corporation; its subsidiary was Western Pacific Railroad Company, an operating railroad company, herein referred to as the "debtor"; defendant, the reorganized subsidiary, is The Western Pacific Railroad Company.

Statement of Facts

Plaintiff corporation, a so-called holding company, from 1916 to April 30, 1944, owned all the outstanding capital stock of the debtor. For some years prior to 1935, the financial condition of the debtor had been steadily worsening. In 1935 it filed a petition under Section 77 of the Bankruptcy Act (11 USC 205) and this Court in that year placed its affairs in the hands of trustees. Thereafter a plan of reorganization was proposed and in 1939 it was approved by the Interstate Commerce Commission. 233 ICC 409. Inter alia, it was determined in the plan that the capital stock of the debtor owned by the plaintiff was without equity or value and that plaintiff and its stockholders therefore were not entitled to participate in the plan. In 1940 this Court approved the plan of reorganization, including approval of the findings of the Interstate Commerce Commission as to the worthlessness of the plaintiff's equity. The Circuit Court of Appeals (now Court of Appeals) of the Ninth Circuit reversed in 1941 (124 F. 2d 136). In 1943 the Su-

preme Court reversed the Circuit Court and affirmed the order of the District Court. (318 U.S. 448). It there considered and rejected the contention of the plaintiff that it should have the right to participate in the plan because of recent increased earnings of the debtor. (318 U.S. 508, 509.)

¹ Thereafter, the plan of reorganization was, in accordance with the statutory provisions (11 USC 205e), submitted to the creditors, and, after their approval, the plan was confirmed on October 11, 1943, by this Court. The reorganization committee designated in the plan of reorganization, instead of forming a new corporation, determined to use the corporate structure or shell of the old company (debtor) and to execute the plan of reorganization by revesting its former properties in the reorganized company, i.e., the defendant. On November 22, 1943, an agreement was made between the plaintiff, its secured creditors and the reorganization committee wherein a modus of revesting was set up. Among other things, the plaintiff agreed therein to transfer all of its stock in the debtor to the reorganization committee. This agreement was approved by this Court, in December, 1943. The transfer of the stock was not actually made until April, 1944, because of an unsuccessful litigative² attempt

¹ See in re Denver & R.G.W.R. Co. 10 Cir. 150 Fed. 2d 28 and R.F.C. v. D. & R.G.R. Co. 328 U.S. 495, where similar holdings upon similar contentions were made.

² Bryant v. Western Pac. R. Corp. 35 A. 2d 909 (Del. Ch. Feb. 10, 1944.)

to prevent the same. During the period of years in which the plaintiff was the owner of all the outstanding stock of the debtor, plaintiff had followed the practice of filing consolidated or affiliated income tax returns, in which it had reported the earnings of the debtor as well as other affiliated companies, which the plaintiff wholly or partly owned. The amount of taxes paid by the plaintiff pursuant to such returns was allocated among the various subsidiary companies having taxable income in proportion to the amount of such taxable income. The practice of filing the consolidated returns continued throughout the reorganization period. The returns, during the reorganization period, were prepared by the employees of the debtor and signed by the president of the plaintiff corporation, although they were never submitted to its board of directors for approval or consideration.

During the year 1942, the debtor made substantial net earnings. Neither plaintiff, nor any of its other subsidiary companies, had any earnings during 1942. A consolidated return was filed for the year 1942 in which the tax liability, due to the earnings of the debtor, was \$4,144,828. Later in 1943, after the filing of the 1942 return and payment of the tax, the tax attorneys for defendant "discovered" Section 123 of the Revenue Act of 1942. (26 USC 23(g)4.)³ They proposed what they de-

³ "Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capi-

noted a "paradoxical" theory, by which the worthlessness of the plaintiff's stock (which had cost the plaintiff some \$75,000,000) in the operating railroad company (debtor), might be availed of as an offset to the operating income of the debtor and thus result in a net loss and no tax obligation. Further, their theory was that part of this \$75,000,000 loss in 1943, could be "carried back" to 1942 (§122(b)(1) of the Internal Revenue Code.) and part could be "carried over" to 1944 (§122(b)(2) of the Internal Revenue Code.).

Thereupon a claim for refund of the amount of tax paid for 1942 was filed in the name of the plaintiff. Operations of the debtor during 1943 and up to April 30, 1944, were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some \$17,000,000 in income taxes. So the tax attorneys caused the filing of consolidated tax returns for 1943 and for the forepart of 1944 in the name of plaintiff, in which sufficient portions of the \$75,000,000 stock loss were used as offsets against the operating accounts for these years, so as to show no net income. The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had between the tax counsel for the defendant and the Commissioner. As a result, a tax settlement was made with the Commis-

tal asset." (Subsection 4 of § 23g). By this subsection, losses resulting from worthlessness of stock of an affiliate became operating losses instead of capital losses as theretofore.

sioner whereby, in consideration of the withdrawal of the claim for refund, the Commissioner accepted and approved the returns. The nature and basis of this compromise settlement will be hereafter more fully discussed.

Subsequent to the filing of the claim for refund of the 1942 tax paid, and the filing of the consolidated tax returns for 1943 and part of 1944, and after negotiations for the settlement of the entire tax issue with the Commissioner of Internal Revenue had started, the plaintiff, on October 10, 1946, filed its bill of complaint in equity herein. In substance the bill of complaint recited the filing of the claim for refund, the commencement of the negotiations for the approval of the consolidated returns and prayed that the Court settle the proprietary rights of the plaintiff and the defendant in the tax saving involved. It was further prayed that funds equivalent to the tax savings be placed in the custody of the court for proper and equitable distribution.⁴

On April 7, 1947, the Court permitted the filing of a complaint in intervention on behalf of certain stockholders of the plaintiff who wished to join in the demand of the plaintiff and in its prayer for relief against the defendant. The settlement and agreement with the Commissioner, by which the claim for refund was withdrawn and the consoli-

⁴ The debtor had on two separate occasions set aside reserve funds for the payment of the taxes, to protect against the contingency of adverse ruling by Commissioner or Court.

dated returns for the years 1942, 1943 and part of 1944 were accepted and approved, was consummated on August 14, 1947.

On December 17, 1947, plaintiff filed a supplementary bill of complaint, wherein the consummation of the settlement and compromise was set forth. It was there further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated returns for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as "duality of control."

In the supplementary complaint, the plaintiff prayed that the Court, in equity, enter a decree allocating and directing the payment of the abated taxes, amounting to some \$17,000,000, to the plaintiff by way of mitigation of its losses in its subsidiary.

After many preliminary motions were made and disposed of, and after the filing of answers by the defendant and after pre-trial conferences, the cause finally came on for trial.

The trial itself consumed 13 days; the proceedings are set forth in 1700 pages of transcript; 14 witnesses testified and 164 exhibits, with various subdivisions, were introduced in evidence.

A number of special defenses were pleaded and testimony and exhibits offered at the trial in support thereof.

But I am of the opinion, in view of the fact that the cause is concededly of equitable cognizance, that decision must depend upon the essential righteousness of plaintiff's claim as an equitable demand.

Discussion

The income tax picture presented is bizarre indeed. It is "paradoxical" as the defendant's tax attorneys put it.⁵ The Western Pacific Railroad Company, the operating company, profitably conducted its railroad facilities in reorganization during 1942, 1943 and the forepart of 1944. Its own profit and loss records showed the debtor to be accountable to the United States in the sum of \$21,346,567 income taxes for the years 1942, 1943 and the first four months of 1944. During this same period of time the plaintiff was still the legal owner of all the capital stock of the debtor, an ownership which had been declared by both the Interstate Commerce Commission and the Reorganization Court to be valueless. But the tax attorneys for the defendant conceived a "paradoxical" plan. They

⁵ In a letter dated May 20, 1943 (plff. Ex. 50) addressed to Curry, Vice President of defendant company, tax counsel Polk set forth his idea of using the plaintiff's stock loss in the debtor to offset debtor's profits, saying: "This is commented upon rather than suggested, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless." (Interlineation supplied.)

decided that they would file, pursuant to Section 141 of the Internal Revenue Code and the Treasury Regulations issued thereunder⁶ affiliated or consolidated returns on behalf of the parent company and its subsidiaries and in them set up the plaintiff's stock loss (i.e., its ownership in the debtor) as an income tax deduction against the operating profits. Ostensibly they found their authority for so doing in Section 123 of the Revenue Act of 1942. (26 USC §23(g)4).⁷ Thus, part of the lost \$75,000,000 stockholding of the plaintiff in the debtor was applied as an offset to operating profits during each of the three years in question to the end that no part of the \$21,346,567 tax would be paid.

This was more than mere tax "saving"; it amounted to a complete tax "escape." But the debtor had already paid \$4,144,828 income taxes for the fiscal year 1942 and it had filed a claim for refund of such taxes upon the ground that it owed no taxes for 1942 if, on the theory of "carry-back," part of the \$75,000,000 stock loss was a proper deduction. So in order to make the far larger saving or "escape" offered for the three years in question, the claim for refund was waived and the Commissioner then accepted the returns for 1942-1943 and the fore part of 1944. The effect of this was that

⁶ § 141 Internal Rev. Code permits the filing of a consolidated return by affiliated corporations. Regulations 104 and 110 contain detailed requirements for such filing.

⁷ See footnote #3.

the debtor paid \$4,144,828 taxes to the United States in order to escape the \$21,346,567 previously mentioned, or a net saving or "escape" of \$17,201,739. To all of this the Commissioner agreed. It was stated to be a compromise because of some question as to the date of definite ascertainment of the stock loss. The Commissioner apparently agreed that, under the 1942 amendment (§23(g)4), it was proper to offset the capital stock loss against the net operating gain, and the taxpayer paid \$4,144,828 to resolve some alleged uncertainty as to the date of ascertainment of the stock loss.⁸

How the amendment to the statute, (§23(g)4), could have been availed of by the debtor is, mildly stated, puzzling, if not downright amazing. Its application in an orthodox case is understandable. The theory of deducting a loss in an economic aggregation of affiliated corporations, where one unit gains and the other unit loses, has been recognized and approved by Congress and the Courts.

Prior to the Revenue Act of 1938, losses resulting from the worthlessness of stocks and bonds were deductible from ordinary income and were not subject to the so-called capital-loss limitations. These limitations, that is that a capital loss could only offset a capital gain, had applied only to sales and

⁸ It is not at all clear to the Court how the alleged uncertainty as to the date of ascertainment of the stock loss, could have been a true factor affecting the tax settlement, inasmuch as any such uncertainty would, if it existed, as well apply with respect to the 1943 and 1944 returns.

exchanges, with the result that it was more advantageous to allow stocks, that might become worthless, to become worthless rather than to sell them. By the 1938 Act losses sustained by reason of the worthlessness of securities were treated as if they resulted from the sale or exchange of capital assets and thus were subject to the limitations applying to deductions in the form of capital losses. 26 USC 23(g)4, which was Section 123 of the Revenue Act of 1942, accorded losses on worthless stocks held by a taxpayer in affiliated corporations the same treatment accorded losses from all worthless securities prior to the Revenue Act of 1938.

Research does not disclose any statement of Congressional reason or purpose for the enactment of Section 123 of the Revenue Act of 1942 (26 USC 23(g)4. It was not in the original House Bill (H.R. 7378), but was an amendment added in the Senate (S. Rept. 1631, p. 89, 77th Cong. 2nd Sess.) Neither the Senator Report, nor the Conference Report of the Bill, H. Rept. 2586 (Cong. Rec. 77th Cong. 2nd Sess. p. 8401, 8441) state the reasons for the amendment. It is of interest that in the Revenue Act of 1942 (26 USC 117(i).) securities held by banks were accorded the same benefits as Section 123 accorded to affiliated corporations. While the purpose and intent of Congress has not anywhere been precisely stated, it is a fair and justifiable inference that the intent was to enlarge the general benefits afforded by consolidated or affiliated corporate returns.

It may be briefly stated that the philosophy of the consolidated return is to disregard the corporate entity and to tax as a single business or economic unit, what really is a business unit. This has been found to be sound, equitable and convenient tax procedure. It treats an affiliate group of corporations as one business enterprise, the various affiliates being considered as if they were branch offices of the main business establishment. The income from all units is considered as a single income, and the losses from all units, are treated as a single loss. See the following in this connection: Mertens, *Law of Federal Income Taxation*, (1942) Vol. 8, §46.01 and §46.02; Montgomery's *Federal Taxes—Corporations and Partnerships 1948-1949*, Vol. II, p. 678; Miller, "The Taxation of Intercompany Income;" *Law and Contemporary Problems*, 1940, Vol. 7, 301, 306; *Commerce Clearing House Standard Federal Tax Reporter*, 1949, Vol. 1, paragraph 200C-1. See also statement of the Acting Secretary of the Treasury, regarding the preliminary report of the Special Committee of the Committee on Ways and Means, 1933, p. 13.

In my opinion, it is crystal clear that in enacting Section 23(g)4, the Congress were merely furthering the general purposes and benefits of the statutory provisions allowing the filing of affiliated corporation returns. Obviously it intended by the provision, (23(g)4), to allow a parent company in an affiliated group, if its ownership of stock in a subsidiary becomes worthless, to offset it against other income of the parent company in any other subsidiaries or

subsidiary, in the same manner, as it had been permitted to offset operating losses in one subsidiary as against operating gains in another. To assume however that the Congress intended by 23(g)4 to statutorily authorize what was done in this case, is to attribute plain stupidity to the Congress of the United States—an unthinkable procedure, despite the general habit of criticism, both fair and unfair.

But here the inexplicable occurred. For \$4,144,828, the United States released \$21,346,567 in taxes upon a basis which is completely incomprehensible. The tax “escape” invites a type of scrutiny which this Court is powerless to give it.

Obviously the Court cannot pass judgment upon the validity of the tax compromise and settlement. It is now closed. It is final and cannot be reopened except for fraud.

I am not unmindful of the recognized and approved philosophy that a taxpayer may avail himself of every proper means of reducing his taxes.⁹ In every sense of the word, however, there was a real escape from the payment of taxes here. If I had the power, I would not hesitate to set aside the tax settlement. Indeed, if I could, I would order these taxes paid to the United States. That would effectively dispose of the cause.

⁹ U.S. v. Isham, 84 U.S. 496, 506; Jones v. Helvering App. D.C. 71 Fed. 2d 214, 217; Iowa Bridge Co. v. Commissioner, 8 Cir. 39 Fed. 2d 777; Commissioner v. Eldridge, 9 Cir. 79 Fed. 2d 629, 631; Mertens: Law of Fed. Taxation (1948) Vol. 10A § 61.06 at 249. Paul: Studies in Federal Taxation (1937) p. 104.

Perhaps it may be said that it is impertinent for the Court to concern itself with a closed tax transaction and agreement such as this. But if equity principles are our guide, then this tax settlement is of the web and woof of the issue to be decided. Equity has no precise boundaries, and certainly not in this unique controversy.

If this were an ordinary and more common type of tax saving, there might be impertinence to the Court's concern with it. But this so-called "saving" is inextricably entwined with the equities. Its very nature shapes and molds these equities. It is a "pot of honey equally attractive to principals and advocates."¹⁰ When equity is invoked to divide or distribute the "pot," it cannot be blindfolded as to the origin or nature of the "honey."

It is argued, in effect, by plaintiff that, irrespective of whether or not the tax settlement was in accord with the statute, nevertheless it is a completed transaction and a closed book and should have no place in the determination of the validity of plaintiff's cause of action. It is asserted that tax savings having been made, the only question remaining is whether or not on the record here, the defendant must turn over to plaintiff an amount equal to, or a substantial part of, the tax savings. But in my opinion, the tax escape was erroneous and unjust. It cannot be cured by committing the further inequity of distributing the gain thus made to others.

¹⁰ *Breving v. Lloyd Cuarto*, 84 Fed. Supp. 33, 35.

Debtor, having made good its "escape," now comes plaintiff and prays for a share, if not all, of that which "escaped." Whether there was, or was not, "duality of control" respecting the directorates of the two companies, appears to me to be not too important. True, there is a preponderance of the evidence in favor of the plaintiff's contention of "duality of control." Be that as it may, I am compelled to rest decision upon the fundamental issue of the justice and equity of plaintiff's right, if any, to be paid for that which was escaped. Analytically speaking, what the plaintiff seeks is to collect from the defendant an amount equal to all, or a substantial part of, taxes that the debtor did not pay to the United States.

What is the true nature of the claim of plaintiff and of the relief it seeks? What plaintiff really seeks is not all or a share of the so-called tax savings. Rather it is a circuitous way of obtaining something in the nature of equity or value for its ownership, rejected in the reorganization plan. Or put differently, it is an effort to share in the earnings of the debtor during the reorganization period. Essentially a so-called tax saving is but a different name for an earning. Assuming, *arguendo*, the validity of plaintiff's contention, its right or claim is dependent upon the debtor making earnings. If there were no earnings there could be no so-called tax saving. A "saving" in taxes is a negative concept. It is a benefit to one obligated to pay money, resulting from not having to pay. No benefit could

inure from participating in non-payment of an obligation, unless there rested upon the participant an obligation to pay. Absent such obligation, any sharing of that which is not paid out, would be gratuitous. In effect therefore, recognition of plaintiff's claim would be recognition of a right in plaintiff to share in debtor's earnings. As already stated, a demand substantially seeking this end was heretofore asserted by way of opposition to the plan and rejected. *Ecker v. Western Pac. Co.* 318 U.S. 448.

Not only that, but the philosophy underlying Section 77 of the Bankruptcy Act stands as a barrier against the equitable validity of plaintiff's claim in this cause. Rehabilitation of a debtor by readjusting its financial structure in the interest of the debtor, its creditors and the public, in a fair and equitable plan of reorganization, is the essential purpose of Section 77. If a debtor in fact has an equity, it is and should be recognized. If not, it is disregarded. Above all, Section 77 was devised to provide in the public interest both a speedy and efficient means of resuscitating, among others, sick and ailing railroads.

See: *Van Schaick v. McCarthy*, 10 Cir. 116 Fed. 2d 987, 992; *New England Coal & Coke Co. v. Rutland R. Co.* 2 Cir. 143 Fed. 2d 179, 185; *In re Denver & R.G.W.R. Co.*, 10 Cir. 150 Fed. 2d 28, 34; *Thompson v. State of Louisiana*, 8 Cir. 98 Fed. 2d 108, 110; Craven "The Judicial and Administrative Mechanism of Section 77," 1940, 7 Law and Contemporary Problems 464.

When it was finally determined, after running the full gamut of court and administrative procedure, in the reorganization of the Western Pacific Railroad Company, that the plaintiff's interest was worthless, nothing short of some extraordinary cause justifying reopening the reorganization proceeding could effect a change. To make any award in this cause, under the assumed authority of equity principles, would be in effect to modify the administrative and judicial judgments in the reorganization proceeding. Such a procedure would be an indirect nullification of the purpose of the reorganization statute, in the guise of an afterthought allegedly of equitable persuasion.

What was the actual result of the tax saving agreement by which it was determined that some \$21,000,000 in taxes were not due to the United States? Simply that the debtor did not pay taxes. It does not follow at all from this, that an obligation to pay the unpaid tax money, one to another, was thereby created.

The so-called "duality of control," much discussed and emphasized, is not important in resolving the tendered issue. For in the final analysis, plaintiff's hope to succeed here depends upon whether it could have lawfully acquired these unpaid tax monies by voluntary agreement between the directorates of the two companies. In my opinion, it could not. For such a procedure would violate and nullify the reorganization plan and the decree of the Court confirming it. It would permit

the plaintiff to share in the earnings of the debtor during the period of reorganization. Equity would aid the creditors of debtor to prevent it. Indeed there is some merit to defendant's contention that a firm obligation rested upon plaintiff to conform and cooperate to the end that the creditors and new owners should be benefited to the fullest.

What would be the result if the contention of plaintiff, that law and equity imposes an obligation upon defendant to pay the whole amount of unpaid tax money over to plaintiff, were sustained? It would mean a court order directing defendant to pay over to plaintiff an amount equal to the taxes the debtor should have paid to the United States. So the plaintiff, which formerly owned and was a failure in operating the debtor, would get from the defendant a sum of money out of debtor's earnings during reorganization equal to the taxes the debtor should have paid to the United States resulting from its profitable operations. In my opinion, such a whirligig rationale transcends all reasonable concepts of equity and justice.

An array of able counsel on both sides have put forth prodigious and ingenious efforts,¹¹ one side to retain the benefits of the tax "escape," and the

¹¹ In the preparation for the trial, and to develop the historical facts concerning the controversy and upon the subject of the so-called "duality of control," the depositions of 13 witnesses were taken over a period of many months and cover 6190 pages of transcript. Briefs, on submission of the cause, total 485 printed pages.

other to obtain them. And all the time the taxes escaped in reality belong to the United States.

The Court cannot cause these taxes to be paid, where they should be paid, to the United States. But, as between the parties, no persuasion of conscience or equity impels me to do otherwise than to leave the parties where they are, the defendant with its amazing and undeserved tax success; the plaintiff, as the reorganization decree left it, without interest in the debtor.

For the reasons stated, judgment will go for the defendant.¹²

Dated: September 6, 1949.

[Endorsed]: Filed September 6, 1949.

¹² Inasmuch as there is little factual dispute pertinent to the issue decided, this opinion may well serve, under the rules, so far as necessary, as findings of fact and conclusions of law. But counsel, if they wish, may submit findings pursuant to the Rules, provided they are limited to the issues involving the essential equitable considerations upon which the decision rests.

[Title of District Court and Cause.]

FINDINGS AND CONCLUSIONS
PROPOSED BY PLAINTIFF

Defendants having given notice under the stipulation and order of September 8, 1949, that they elected not to submit a draft of findings of fact and conclusions of law, plaintiff submits and proposes findings and conclusions as follows:

“Findings of Fact and Conclusions of Law

“The above-entitled cause having been duly tried before the Honorable Louis E. Goodman, District Judge, the court now makes the following

“Findings of Fact

* * *

“6. The offer of settlement made by defendant to the Commissioner of Internal Revenue, as stated in this Court’s opinion, was made in the plaintiff’s name but without its knowledge.

“7. Said offer of settlement was made in February, 1947. Subsequently defendant’s tax counsel first notified the plaintiff thereof. Thereafter plaintiff and defendant agreed upon a stipulation to be entered into in the present case in the form of plaintiff’s Exhibit 7. Thereupon the intervenors applied to the court herein for a temporary restraining order enjoining and restraining the plaintiff and defendant from consummating the proposed settlement. Upon the hearing of said application for

a restraining order defendant presented to the court the proposed stipulation referred to above, and after the hearing this Court, on August 29, 1947, made and entered its order in the form attached hereto. Thereafter said stipulation was signed by the parties and filed herein on September 5, 1947.

* * *

Conclusions of Law

“The court concludes as follows:

“By virtue of the stipulation filed herein on September 5, 1947, and this Court’s order of August 29, 1947, the sum of \$3,385,290.00 must be deemed to have been refunded to plaintiff by the Treasury Department in the ordinary course and manner prescribed by law and by the plaintiff paid into this Court. Said sum is now held by defendant as agent of the court. Defendant should be directed to return said sum of \$3,385,290.00 to the Clerk of this Court, and the Clerk should be directed to deliver said sum forthwith to the plaintiff in accordance with this Court’s opinion that the funds or tax savings resulting from the settlement with the government should be left with the party receiving the same; and the court further concludes that defendant should not be required to account to plaintiff for any tax savings not represented by refunds.”

By proposing the foregoing Findings and Conclusions plaintiff does not waive its claim that it is entitled also to judgment for tax savings not

represented by refunds, but it submits that upon the basis of the reasoning of the Court's opinion the Conclusions of Law proposed above necessarily follow.

Dated: November 3, 1949.

/s/ HERMAN PHLEGER,

/s/ MAURICE E. HARRISON,

/s/ MOSES LASKY,

BROBECK, PHLEGER AND
HARRISON,

/s/ FRANK C. NICODEMUS, JR.,

/s/ A. PERRY OSBORN,

/s/ MAHLON DICKERSON,

/s/ NORRIS DARRELL,

/s/ LeROY R. GOODRICH,

Attorneys for Plaintiff.

[Endorsed]: Filed November 4, 1949.

[Exhibit A attached to the preceding Proposed Findings of Facts and Conclusions of Law is identical to the Order Denying Temporary Restraining Order on Condition and Pretrial Order. See pages 163 to 167.]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR REARGUMENT
AND TO AMEND FINDINGS OF FACT
AND CONCLUSIONS OF LAW APPEAR-
ING IN THE COURT'S OPINION FILED
SEPTEMBER 6, 1949.

To the above-named defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company, and Allen P. Matthew, Esq.; James D. Adams, Esq.; Robert L. Lipman, Esq., Burnham Enersen, Esq., Walker Lowry, Esq., and Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene, Balfour Building, San Francisco, California, their attorneys; to the above-named defendant, Western Realty Company and Eugene M. Prince, Esq.; Everett A. Mathews, Esq.; Homer G. Angelo, Esq., and Messrs. Pillsbury, Madison & Sutro, 225 Bush Street, San Francisco, California, and A. Donald McKinnon, Esq., and Messrs. Milbank, Tweed, Hope & Hadley, 15 Broad Street, New York, New York, and Forbes D. Shaw, Esq., and Messrs. Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York, New York, its attorneys, and to the above-named plaintiff, The Western Pacific Railroad Corporation and Herman Phleger, Esq.; Maurice E. Harrison, Esq.; Moses Lasky, Esq., and Messrs. Brobeck,

Phleger & Harrison, 111 Sutter Street, San Francisco, California, and Messrs. Frank C. Nicodemus, Jr., A. Perry Osborn, Norris Darrell, Mahlon Dickerson and Leroy R. Goodrich, its attorneys:

You and Each of You Will Please Take Notice that on Monday, the 14th day of November, 1949, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled Court, the Honorable Louis E. Goodman presiding, in the United States Post Office Building, San Francisco, California, the undersigned will move said Court on behalf of the plaintiffs in intervention herein, Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., a corporation, for leave to re-argue this case and to amend and add to the findings of fact and conclusions of law appearing in the Court's opinion dated and filed herein on September 6, 1949, to require defendants to pay the sum of \$3,385,290.00 to the clerk of said Court and said clerk in turn to surrender possession of said sum and pay the same over to the plaintiff The Western Pacific Railroad Corporation as constituting the proceeds due plaintiff from the refund claim filed by it with the United States Government for the taxable year 1942 as reduced by settlement with the Government.

Said motion will be made on the grounds that on or about August 29, 1947, this Court made and entered its pretrial order herein based upon the

written stipulation of said plaintiff and defendants, as the condition for the denial by said Court of an application theretofore made by interveners for an order restraining the settlement with the United States Government of plaintiff's and defendants' tax liability on a consolidated basis for the taxable years 1942 and 1943 and the first four months of 1944, which pretrial order expressly provides that this Court shall determine the issues and give judgment herein in the same manner as if the tax savings for the year 1943 and first four months of 1944 had been allowed and said refund claim allowed and paid by the United States Government in the ordinary course and manner prescribed by law, to wit, to plaintiff in accordance with Treasury Department regulations 104 and 110, and as proportionately reduced by said settlement and which stipulation expressly provides that said refund claim as diminished by said settlement shall be deemed to have been allowed by the United States Government and paid to said plaintiff corporation as required by law and by said plaintiff paid into this Court; that in its said opinion made and filed herein on September 6, 1949, as aforesaid, the Court has announced its intention of leaving the parties where they are; that the proceeds from said refund claim as proportionately reduced by said settlement in accordance with said pretrial order and stipulation amount to the sum of \$3,385,290.00 and remain in the actual possession of defendants; and that in concluding in its

said opinion that defendants should have judgment herein without ordering the surrender of said sum of \$3,385,290.00 to the plaintiff corporation, the Court acted under a misapprehension of fact in that it overlooked and gave no effect whatsoever to its aforesaid pretrial order or to said stipulation.

Said motion will be further made and based upon this notice, upon the affidavit of Julius Levy, Esq., dated October 28, 1949, annexed hereto, the accompanying points and authorities and upon all the records, papers, pleadings and files in this action.

Dated: November 3, 1949.

WEBSTER V. CLARK,
ROGERS AND CLARK,
DAVID FREIDENRICH,
JULIUS LEVY,

By /s/ WEBSTER V. CLARK,

Attorneys for Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., a corporation, Plaintiffs in Intervention.

[Title of District Court and Cause.]

AFFIDAVIT OF JULIUS LEVY

Julius Levy, being duly sworn, deposes and says:

I am one of the attorneys for the plaintiffs-intervenors herein.

This affidavit is submitted in support of a motion for reargument and to amend the findings set forth in this Court's opinion dated September 6, 1949.

Basis for the Motion

In its opinion this Court, because it found the tax savings were "erroneous and unjust"—a tax "escape"—and "in reality" the property of the United States, concluded that equity must leave the parties "where they are."

The Court then proceeded to leave the parties where it believed they were—defendant with all and plaintiff with none, of the tax savings.

In so doing, we respectfully urge that the Court labored under a misapprehension of fact. It overlooks its own pretrial order (unmentioned in the opinion) entered on intervenors' motion to enjoin the tax settlement with the United States.

Plaintiff, in fact, as determined by that pretrial order, was in the position of having \$3,385,290 of the tax "escape." Therefore, to leave plaintiff where the Court found it, requires plaintiff to be left with \$3,385,290.

The Court's Order and Its Effect

During the pendency of this action, on August 25, 1947, the intervenors brought on a motion to enjoin the consummation of the then pending offer to settle with the United States Government. By that offer, the Government's total claim of \$21,000,000 covering the 1942 refund claim and the

years 1943 and part of 1944, were to be settled for approximately \$4,000,000. The suggested mechanics for accomplishing this result were for the Government to accept the 1943 and 1944 returns as filed and to reject the refund claim.

But for the settlement, the refund claim, if eventually approved, would have been paid by the United States to the plaintiff; plaintiff would have had possession of those tax savings. Similarly, if the 1943 and 1944 returns were accepted, defendant which had paid no taxes for those years, would remain in possession of those tax savings. However, the proposed settlement, if consummated without more, would deprive plaintiff of possession of any part of the tax savings—its refund claim was being waived—and it would give to defendant sole possession of all of the tax savings.

We sought to enjoin the settlement solely because its form would prejudice plaintiff's rights in this very litigation.

We urged that the settlement's failure to continue plaintiff's normal right to possession of a part of the savings would seriously prejudice plaintiff's rights in this litigation. Defendant's defenses of limitation, laches, etc., heretofore sufficient (if sustained) merely to defeat plaintiff's claim to savings in defendants' possession but without force to determine plaintiff's right to retain tax savings in plaintiff's possession, would, if the settlement were put through in the contemplated form, operate to defeat plaintiff's entire claim in the action

since defendant alone would possess all the savings. The importance of possession was emphasized by defendants' answer; for before the settlement, it pleaded a counterclaim to recover from plaintiff the proceeds of the refund claim when, as and if it came into plaintiff's possession (Answer, par. V).

Over and above the prejudice foreseeable from the contents of the pleadings, we urged and hypothesized that this Court might very well conclude, for one reason or another, to leave the parties where it found them; and, again, it would be of the greatest importance for plaintiff to have possession of so much of the tax savings as would normally come into its possession. For all of these reasons, we contended that the form of the settlement should not alter the normal status quo of the parties to this litigation. We suggested an easy and effective expedient for preventing the settlement from divesting plaintiff of possession of about \$3,000,000 of tax savings, i.e.: The parties should by agreement give plaintiff possession of the refund claim proceeds pro tanto reduced by the settlement and permit defendant to retain possession of the remaining tax savings similarly reduced. Both parties could then litigate their title to the tax savings in this action unaffected and unprejudiced by changes in possession produced solely by the form of any settlement with the United States Government.

This Court thereupon entered the following order designed to accomplish this very result:

“It Is Hereby Ordered:

“(1) That the application of interveners for a restraining order be and the same is hereby denied upon the condition that the defendants shall enter into a stipulation with the plaintiff in the form annexed hereto marked Exhibit A; and upon the further condition that said hearing upon said application of interveners shall be deemed a pretrial hearing on the aforesaid issues as if properly noticed as such so that the Court may make and enter an appropriate pretrial order pursuant thereto; and

“(2) That the aforesaid settlement with the United States Government shall have force and effect in this action and as between the parties hereto solely to the extent that it reduces pro tanto the total amount in controversy herein and that in all other respects this Court shall and does hereby preserve the respective rights and positions of all parties and shall determine the issues and give judgment herein, in the same manner as if said tax saving and been allowed and said refund claim allowed and paid by the United States Government in the ordinary course and manner prescribed by law and as proportionately reduced by said settlement.”

By its unequivocal language clearly reflecting the parties' intention, this order expressly fixes the

parties' "positions," i.e., plaintiff is put in the position of having the reduced refund proceeds and the stipulation, Exhibit "A," deems these very funds "paid to the plaintiff * * * and by the plaintiff paid into court." The order then requires the court to determine the "issues" and to render the "judgment" on the basis of that clearly stated position of plaintiff.

Hence this Court, to leave the parties "where they are," must in its final judgment leave the plaintiff with the reduced refund proceeds of \$3,385,290, and the defendants with the balance. Anything else would make both the parties' stipulation and the Court's order a mockery and a meaningless gesture which had served merely to engender misplaced reliance.

We have not sought to answer any contentions bearing on the rights of the parties inter sese. This Court has cut short any such inquiry by its conclusion that, because of the contaminated origin of the tax savings, it will leave the parties "where they are." It has thereby rendered immaterial whatever may have been the rights of the parties inter sese, if this Court were disposed to determine them. For, as this Court stated, the evil of the savings' origin "cannot be cured by committing the further inequity of distributing the gain thus made to others" (Op. 14).

We therefore submit that reargument should be granted and this Court's opinion amended to require defendants to pay \$3,385,290 to the Clerk

of the Court and the Clerk, in turn, to surrender its possession to the plaintiff.

/s/ JULIUS LEVY.

Sworn to before me this 28th day of October, 1949.

/s/ ETHEL RADIN,

Notary Public in the State
of New York.

[Endorsed]: Filed November 4, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION OF PLAINTIFF AND
OF ALEXIS I. duP. BAYARD, RECEIVER,
TO JOIN RECEIVER AS PARTY PLAINTIFF
UNDER RULE 25(c) R.C.P.

To defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Deep Creek Railroad Company, Standard Realty and Development Company, Tidewater Southern Railway,

and to their attorneys, Allen P. Matthew, Esq.; James Adams, Esq.; Robert L. Lipman, Esq.; Burnham Enersen, Esq.; Walker Lowry, Esq., and Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene;

To defendant, Western Realty Company, and to its attorneys Everett A. Matthews, Esq.; Messrs.

Pillsbury, Madison & Sutro, J. Donald MacKinnon, Esq.; Messrs. Milbank, Tweed, Hope & Hadley; Forbes D. Shaw, Esq., and Messrs. Whitman, Ransom, Coulson & Goetz;

To plaintiffs in intervention, Russell M. Van Kirk, Henry Offerman and J. S. Farlee & Co., Inc., and to their attorneys, Messrs. Rogers and Clark, Webster V. Clark, Esq.; David Freidenrich, Esq.; Julius Levy, Esq.; Messrs. Pomerantz, Levy, Schreiber & Haudek, and Abraham L. Pomerantz, Esq.

Please Take Notice, hereby given, that on Monday, the 21st day of November, 1949, at the hour of 10 o'clock a.m. or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court, in the Post Office Building, in the City and County of San Francisco, before the Honorable Louis E. Goodman, District Judge, the plaintiff and Alexis I. duP. Bayard, as Receiver of the plaintiff, will move the court for an order directing said Alexis I. duP. Bayard, as such Receiver, to be joined as party plaintiff herein.

This motion will be made on the following grounds: An order was made and entered by the Court of Chancery of the State of Delaware in and for New Castle County appointing Alexis I. duP. Bayard as Receiver of plaintiff, The Western Pacific Railroad Corporation, to take charge of its estate and effects and to collect the debts and properties due and belonging to it with power to enter his appearance in, and to prosecute and defend

in its name or otherwise, all suits and proceedings which may be necessary or proper for said purpose, including the instant action; Exhibit A hereto attached is a certified copy of said order. Said order was issued in a certain suit instituted by the filing of a petition by the Attorney General of the State of Delaware on October 19, 1949, wherein an answer by the defendant therein, the plaintiff in the present action, was filed the same day; Exhibits B and C attached hereto are certified copies of said complaint and answer, respectively. On Wednesday, the Nineteenth day of October, 1949, said Alexis I. duP. Bayard duly qualified as said receiver by executing and filing in the office of the Register of said Chancery Court a bond in the form and amount as specified in said order, as shown by the affidavit of said Alexis I. duP. Bayard hereto attached as Exhibit D.

Said motion will be based on this notice of motion, the four exhibits hereto attached, and on all pleadings and papers on file herein.

Dated: November 14, 1949.

HERMAN PHLEGER,

MAURICE E. HARRISON,

MOSES LASKY,

BROBECK, PHLEGER AND
HARRISON.

By /s/ FRANK C. NICODEMUS, JR.

EXHIBIT "A"

In the Court of Chancery of the State of Delaware
In and for New Castle County

Civic Action No. 131

ALBERT W. JAMES, Attorney General of the
State of Delaware, ex rel LAWRENCE O.
ROSS,

vs.

THE WESTERN PACIFIC RAILROAD COR-
PORATION, a Corporation of the State of
Delaware.

ORDER

And Now To Wit this 19th day of October, 1949, the complaint of Albert W. James, Attorney General of the State of Delaware, ex rel Lawrence O. Ross, praying for the appointment of a trustee or trustees of said defendant corporation, having been presented, read and maturely considered together with the answer to said complaint, filed on behalf of said corporation, admitting the allegations of said complaint and consenting to its prayers; and

It appearing to the Court that it would be to the best interest of the corporation and the stockholders thereof, that the relief prayed for be granted, it is on motion of the plaintiff found by the Chancellor that there has been a failure of defendant's primary corporate purpose and/or

abuse, misuse or nonuse of its corporate powers, privileges or franchises; and it is ordered by the Chancellor:

1. That the defendant be and it is hereby placed in the judicial custody of this Court for liquidation and dissolution.

2. That Alexis I. duP. Bayard of the County of New Castle and State of Delaware, be and he is hereby appointed receiver of the defendant corporation to take charge of the estate and effects of said corporation and to collect the debts and properties due and belonging to said corporation with power to enter his appearance in and to prosecute and defend in the name of said corporation or otherwise, all suits and proceedings which may be necessary or proper for the purpose aforesaid, including the three causes of action referred to in paragraph 8 of the complaint, and to appoint an agent or agents under him and to select attorneys to represent him and to do all other acts which might be done by said corporation, if in being, that may be necessary for the final settlement and liquidation of the affairs of said corporation.

3. That said receiver herein appointed shall execute and file in the office of the Register of this Court, a bond in the usual form with surety to be approved by the Chancellor in the penal sum of Five Thousand Dollars (\$5,000.00) conditioned on the faithful performance of his duties as receiver in this proceeding and for the proper accounting

to the Court for any moneys and property that may come into his hands as such receiver; provided that said receiver shall deposit all negotiable securities and all cash assets in the Wilmington Trust Company of Wilmington, Delaware.

4. That United States Fidelity and Guaranty Company, a corporation of the State of Maryland, be and it is hereby approved as surety upon the bond of the receiver herein appointed.

/s/ COLLINS J. SEITZ,
Vice-Chancellor.

EXHIBIT "B"

In the Court of Chancery of the State of Delaware
In and for New Castle County

Civil Action No. 131

ALBERT W. JAMES, Attorney General of the
State of Delaware, ex rel LAWRENCE O.
ROSS,

vs.

THE WESTERN PACIFIC RAILROAD CORPORATION, a Corporation of the State of Delaware.

COMPLAINT

The complaint of Albert W. James, Attorney General of the State of Delaware, ex rel Lawrence O. Ross respectfully shows to the Chancellor as follows:

1. Relator, Lawrence O. Ross, whose address is 64-15A 186th Lane, Flushing, New York, is the registered holder and owner of 3,600 shares of preferred stock out of a total of 400,000 shares outstanding of the defendant corporation. He is associated with and is working cooperatively with a group of stockholders whose holdings of preferred stock of the defendant corporation are substantial. There are also outstanding 600,000 shares of common stock of the defendant corporation.

2. The defendant, which is not a corporation for public improvement, was duly incorporated under the laws of the State of Delaware on June 29, 1916, for the primary purpose of acquiring all of the capital stock of The Western Pacific Railroad Company, a railroad company owning lines of railroad lying in the states of Utah, Nevada and California, and constituting a single line of railway from Oakland, California, to Salt Lake City, Utah. The defendant has its principal office in the City of Wilmington, County of New Castle and State of Delaware.

3. This is an action brought under Section 68 of the Delaware Corporation Law, which vests in the Court of Chancery jurisdiction to revoke or forfeit charters of corporations organized under the laws of the State of Delaware for "abuse, misuse or nonuse of their corporate powers, privileges or franchises." There is also invoked the general equity power of this Court to take jurisdiction of a corporation, the primary corporate

purpose of which has failed, and which is unable to meet its debts as they mature. The relief sought by this complaint is the revocation of defendant's corporate charter and the appointment of a trustee or trustees to administer and eventually to windup the affairs of the corporation, under the guidance of this Honorable Court.

* * *

6. As a consequence of the two reorganization proceedings referred to above which denuded The Western Pacific Railroad Corporation of its entire stock investment in The Western Pacific Railroad Company and the Denver and Rio Grande Western Railroad Company, the defendant corporation virtually ceased to exist and the corporate purpose for which it was organized failed. Nothing remains for The Western Pacific Railroad Corporation to do other than to collect and distribute its assets to its stockholders.¹ The defendant corporation has not paid the Delaware Corporation Franchise Tax for the years 1947 and 1948 and the tax for several preceding years was accepted by the State of Delaware on a partial basis because of the failure of the corporation to perform the functions for which it was created. It is recognized that defendant's corporate charter, in the absence of

¹The defendant corporation has outstanding 400,000 shares of preferred stock having a par value of \$100 per share. Under no circumstances can the common stockholders hope to receive any liquidating dividend on the 600,000 shares of common stock also outstanding.

earlier action by this Court, would not be forfeited until April 1, 1950, through failure to pay the Delaware Franchise Tax; nonetheless, the defendant has not operated within the purview of its corporate powers for many years. In view of the circumstances hereinabove and hereinafter recited, any additional payment of franchise taxes would constitute a waste of funds available for distribution to its stockholders.

7. After the aforesaid order of the Supreme Court of March, 1943, in *Ecker v. Western Pacific Railroad Corporation*, supra, the defendant corporation faced with complete financial collapse, fell into a state of corporate coma, and what corporate activities were engaged in by the defendant were directed and controlled by The Western Pacific Railroad Company for its own interests and purposes, and not for the purposes for which the defendant was intended. Defendant's corporate existence was maintained during the critical tax period at the direction and insistence of tax counsel for The Western Pacific Railroad Company which took over and used the tremendous stock loss sustained by the defendant corporation in an amount of more than \$75,000,000, as an offset against taxes due on its own substantial operating income. As of the spring of 1943, the defendant corporation was virtually without liquid assets. In June of 1943, it ceased to pay any office expenses or to pay any compensation to its officers and employees. Its officers and employees and all of its office expenses

were paid by its subsidiary company, The Western Pacific Railroad Company. After June 1, 1943, the defendant corporation had only one officer, a Mr. Michael J. Curry, who had been the corporation's chief clerk, and who was paid, as were its other employees, by The Western Pacific Railroad Company. This state of affairs continued until May 1, 1945, since which date defendant's remaining personnel have been compensated by tax counsel for The Western Pacific Railroad Company. Having come to the conclusion that it was possible under the Internal Revenue Law to offset the loss of the holding company against the income of the operating company, it is apparent that the defendant corporation was kept in being by counsel and officers of the operating company solely for the purpose of discharging the tax liability of the operating company through the use of the defendant corporation's operating losses and other tax credits. At no time during this period were the directors² of the defendant corporation advised as to what were the rights of the defendant corporation in connection with the filing of consolidated returns.

²From June 1, 1943, until suit by the present defendant against The Western Pacific Railroad Company for unjust enrichment was filed in California in October, 1946, nine persons were at one time or another directors of the defendant corporation. Only three were not employees of The Western Pacific Railroad Company, and one was not only a director of the subsidiary but was chairman of that company's executive committee and one of its trustees in bankruptcy.

After negotiations with the Government were initiated in regards to acceptance of consolidated returns, Mr. Curry, at the request of Mr. James K. Polk, counsel for The Western Pacific Railroad Company, gave him a power of attorney to act for the defendant corporation in settlement negotiations, but neither Mr. Curry nor the directors of the corporation were informed about the ultimate purpose of the power of attorney. Finally, in June of 1946, a stockholders' bill was filed in New York by certain of the defendant's stockholders, as a result of which the directors of the defendant corporation elected in 1944, learned for the first time that the stock loss sustained by the defendant corporation had been utilized by The Western Pacific Railroad Company on consolidated tax returns for the years 1942, 1943 and the first four months of 1944, whereupon on October 10, 1946, suit in the District Court in California was instituted by the present defendant, at the instance of a revitalized board of directors.

8. The only assets remaining in the hands of The Western Pacific Railroad Corporation in addition to a small amount of cash, namely, a sum not in excess of \$5,000, are the following causes of action which are now pending as hereinafter set forth:

a) The suit in the United States District Court for the Northern District of California, Southern Division, hereinbefore referred to, wherein the present defendant corporation seeks to recover all or

part of the \$17,500,000 tax saving unjustifiably gained by The Western Pacific Railroad Company through a taking over of all of the defendant's stock loss of \$75,000,000. On September 6, 1949, Judge Goodman filed an opinion in this cause directing that judgment would be entered for the defendant, The Western Pacific Railroad Company. A copy of this opinion is attached hereto and marked Exhibit "A."

* * *

Until the present time, the present board of directors of the defendant corporation, has diligently sought to protect the interests of all of the stockholders of the defendant corporation and to recover for them some part of the enormous sums lost by them in the bankruptcy of The Western Pacific Railroad Company and The Denver and Rio Grande Western Railroad Company.

9. In each of the above-referred-to actions, however, the defendant corporation is faced with important decisions. In the action pending in the District Court of California against The Western Pacific Railroad Company, there is the immediate problem as to whether an appeal should be prosecuted or whether discussions should be entered into with The Western Pacific Railroad Company with a view to a negotiated settlement. Similarly, in the other two pending actions, the defendant corporation is faced with the problem of deciding whether diligent efforts should be maintained to bring said actions to final conclusion either by trial or negotia-

tion. For all of the foregoing reasons the present board of directors of the defendant corporation having no recent mandate from stockholders of the defendant corporation and being under constant pressure for moneys wherewith to prosecute the pending litigations is in no position to assume responsibility for the determination of these many serious problems without the aid and guidance of this Court. It is likewise unclear in the event that these problems were to be submitted to the stockholders of the defendant corporation for their approval or disapproval, whether the vote of a majority of such stockholders would bind a dissenting minority.

Moreover, the defendant corporation although confident of substantial realizations in some one or more of the pending litigations, particularly the litigation instituted in California on October 10, 1946, as hereinbefore alleged, which counsel believe is strengthened rather than weakened by the annexed opinion of Judge Goodman because of his factual finding that the operating company has been unjustly enriched to the extent of \$17,500,000, which unjust enrichment was due wholly to the extraordinary losses and the tax credits of the defendant corporation, it is nevertheless under serious financial handicaps in meeting essential expense in connection with the prosecution of its just claims.

* * *

10. Under the circumstances, there is no alternative to a prompt and equitable solution to these

problems other than the voiding of the corporate charter of the defendant corporation and the appointment of a trustee or receiver to act for the corporation under the aid and guidance of this Honorable Court in disposing of the above-recited matters as well as in effecting a gradual liquidation of said corporation.

Wherefore, plaintiff, ex rel Lawrence O. Ross, prays as follows:

1) That this Court decree that there has been a failure of defendant's primary corporate purpose and/or abuse, misuse or nonuse of its corporate powers, privileges or franchises.

2) That an order be entered directing that the corporate existence of the defendant be dissolved.

3) In aid of the relief above prayed for, that the board of directors or an appropriate committee thereof or such person or persons as this Honorable Court shall select be appointed liquidating trustee or trustees with all of the powers of equity receivers, including, inter alia, the power under order of this Court, to prosecute in the name of the defendant corporation the three causes of action set forth in paragraph 8 of this complaint and all other proper claims and demands whether of a legal or of an equitable nature in any court of competent jurisdiction against all persons and corporations obligated to the defendant, the power to compromise claims of the defendant against all persons and corporations obligated to the defendant, the power to

defend the corporation against claims of alleged creditors and others, and the power to distribute to those entitled thereto, the assets of the defendant corporation as shall be directed by this Honorable Court.

4) That the defendant corporation, its officers, directors, agents, attorneys and employees, be ordered to deliver to said trustee or trustees, all property of every kind and description and all books of account, papers and documents, belonging to or in anywise pertaining to the defendant corporation or its business.

5) That pending final determination of this cause, that a trustee or trustees pendente lite be appointed by order of this Honorable Court to take charge of and to protect and safeguard, pursuant to Court order, the property and assets of the defendant corporation.

6) That plaintiff, ex rel Lawrence O. Ross, may have such other and further relief as the nature of the cause may require or as the Chancellor may deem equitable, just and proper in the premises.

/s/ ALBERT W. JAMES,
Attorney General,
State of Delaware.

/s/ DANIEL L. HERRMANN,
Attorney for Relator.

State of Delaware,
New Castle County—ss.

Be It Remembered that on this 13th day of October, 1949, personally came before me the Subscriber, a Notary Public for the State and County aforesaid, Albert W. James, Attorney General of the State of Delaware, who, being by me duly sworn according to law, did depose and say that the matter contained in the foregoing bill of complaint is true insofar as it concerns his act and deed and insofar as it relates to the act and deed of any other person is believed by him to be true.

/s/ ALBERT W. JAMES.

Sworn to and subscribed before me, the day and year first above written.

[Seal] /s/ JOHN L. MALONE,
Notary Public.

[Exhibit A-1 attached to the preceding document is identical to the Opinion set out on pages 258 to 279.]

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS TO FINDINGS
AND CONCLUSIONS PROPOSED BY
PLAINTIFF

I.

Defendants object to each of plaintiff's proposed findings of fact on the following grounds:

1. The proposed findings are not "limited to the issues involving the essential equitable considerations upon which the decision rests." For the most part they relate to "duality of control," which the Court held "is not important," and despite the fact that the Court rested its decision "upon the fundamental issue of the justice and equity of plaintiff's right."

2. The proposed findings are, on the undisputed evidence, erroneous in many particulars, as set forth below.

II.

(a) Plaintiff's proposed finding No. 2 reads:

"2. The consolidated returns for 1942, 1943 and the first four months of 1944, and the claim for refund were filed, respectively, May 15, 1943; July 15, 1944, and June 15, 1945, and March 9, 1945. The return for the first four months of 1944 and the claim for refund were filed by the defendant; the returns for 1942 and 1943 were filed by the debtor."

The first sentence is accurate. The second sentence to be accurate should read:

“The consolidated returns for 1942 and 1943 and the consolidated return which included the first four months of 1944 were each signed and filed by plaintiff’s president, and the refund claim for 1942 was signed by plaintiff’s president and filed by tax counsel for the affiliated group.”

(See as to the signing and filing of the 1942 return, R. 320, 542, 551-52; of the 1943 return, R. 322, 365; of the 1944 return, R. 324; of the refund claim, R. 325, 1307, 1339-40. As to the status of Mr. Polk as counsel for the group, see R. 1287, 1321-22, 1071, 1115.)

(b) Plaintiff’s proposed finding No. 3 reads:

“3. At all times herein referred to the plaintiff’s president, who signed the said returns and the claim for refund, was defendant’s vice-president and employee,* and at the time when he signed the return for the first four months of 1944 and the power of attorney referred to in paragraph 5 below he was in the paid retainer of defendants’ tax counsel.”

This statement to be accurate should read:

“Plaintiff’s president, Michael J. Curry, signed the said returns and the claim for refund. On May 15, 1943, the date of the 1942 return, Mr.

*In its proposed findings plaintiff has frequently failed to distinguish between the railroad company prior to reorganization, the reorganization trustees and the reorganized railroad company. Only the latter may be correctly designated as defendant.

Curry was both plaintiff's president and a vice-president of the debtor in reorganization. His salary was then paid in part by plaintiff and in part by the reorganization trustees. On July 15, 1944, the date of the 1943 return, Mr. Curry was both president of plaintiff and vice-president of the debtor in reorganization. His salary was paid in its entirety by the reorganization trustees who, pursuant to the request of plaintiff, had agreed to pay the expenses of the New York office. On March 9, 1945, the date of the refund claim, Mr. Curry was both president of plaintiff and a vice-president of the reorganized The Western Pacific Railroad Company and his salary was paid by that company. On June 15, 1945, the date of the 1944 return, Mr. Curry was president of plaintiff. He then held no office with and was receiving no salary from the reorganized The Western Pacific Railroad Company, but he was receiving a retainer from the law firm of Whitman, Ransom, Coulson & Goetz, which had been employed as tax counsel by the reorganization trustees and whose employment for tax purposes was continued by defendant, the reorganized company."

(See as to Mr. Curry's positions and compensation on May 15, 1943, R.P.Exs. 21, 23, 25, 293-4, 499; on July 15, 1944, R.P.Ex. 21, 23, 25, 293-4, 316; on March 9, 1945, R.P.Exs. 21, 23, 25, 293-4; on June 15, 1945, R.P.Ex. 21, 23, 25, 33, 307-8, 310, 646-47; on the employment of tax counsel, R.P.Ex. 39 A/F, 884,

1071, 1115; on the arrangement for the trustees to pay the expenses of the New York office, R. 1082, 1094-95 and P.Ex. 30.)

(c) Plaintiff's proposed finding No. 4 reads:

"4. Plaintiff did not know until June, 1946, that the debtor had used plaintiff's stock loss in the consolidated returns for 1942 and 1943, or that defendant had used plaintiff's stock loss in the consolidated return for the forepart of 1944 or in a claim for refund."

This statement to be accurate should read:

"Plaintiff's president knew that plaintiff's stock loss had been used in the consolidated returns and in the claim for refund on or before the respective dates on which those returns and the claim for refund were signed by him, and as long as plaintiff maintained an office, the tax returns were prepared in that office by plaintiff's employees. The handling of the tax transactions was discussed in the annual reports published by the reorganization trustees for 1943 on May 1, 1944, for 1944 on May 1, 1945, and by the reorganized The Western Pacific Railroad Company for 1945 on April 1, 1946. Copies of the 1943 report were furnished to plaintiff on June 28, 1944, of the 1944 report in mid 1945. Moreover, on February 21, 1945, plaintiff's president wrote to F. C. Nicodemus, Jr., who was then plaintiff's counsel and who is an attorney for plaintiff in this action, explaining the use of plaintiff's stock loss in the returns for 1942 and

1943 and the proposed use of the stock loss in the 1942 refund claim and the 1944 return. The Court finds that nothing was concealed from plaintiff and that plaintiff either knew or had ample opportunity to know all the facts concerning the tax transactions.”

(See as to Mr. Curry’s information as to the use of the stock loss in the tax returns and refund claim on the dates they were filed, R. 342-43, 365-68, and 604; as to the preparation of the returns in plaintiff’s office, R. 320, 540-41, 1291, 921; as to the annual reports, R. 367-68, 891, and their delivery to plaintiff, R. 1130, 1132; and as to the letter from Mr. Curry to Mr. Nicodemus, Exhibit In. 5; see, in addition, D. Ex. 9, 13, 16, 28, 37-A, 56, and R. 809-12, 887-890, 960, 946, 1048-49, as to the information of the plaintiff’s officers, directors and counsel.)

(d) Plaintiff’s proposed finding No. 5 reads:

“5. In June, 1946, defendant’s tax counsel caused plaintiff’s president to sign in its name a power of attorney to them to represent it in all matters before the Treasury Department and the Bureau of Internal Revenue relating to any matter involving Federal income tax for the years here involved. This power of attorney was signed by plaintiff’s president without consulting plaintiff’s board of directors and without its knowledge. After obtaining it, defendant’s tax counsel

conducted all negotiations for a settlement in the name of the plaintiff under this power of attorney and on behalf of defendant and with its knowledge.”

This statement to be accurate should read:

“In June, 1946, plaintiff’s president, at the request of James K. Polk, acting as counsel for the affiliated group, signed on behalf of plaintiff a power of attorney authorizing Mr. Polk and his associates to represent plaintiff in all matters before the Treasury Department and the Bureau of Internal Revenue relating to Federal income taxes for the years here involved. Similar powers of attorney were obtained from all other group members. The power of attorney from plaintiff was signed by plaintiff’s president in the ordinary course of business and without consulting plaintiff’s board of directors. In September, 1946, plaintiff recognized and approved the activities of Mr. Polk on its behalf in connection with tax affairs. After Mr. Polk and his associates obtained powers of attorney from the group members, they conducted the negotiations for settlement in the tax controversy in the name of the plaintiff, as the Treasury Regulations require, and on behalf of the group. The reorganization trustees, and after December 31, 1944, the officers of the reorganized The Western Pacific Railroad Company, were informed of all important developments concerning the negotiations for settlement.”

(See as to the circumstances under which the power of attorney was obtained from plaintiff, R. 326; as to the powers of attorney from the other group members, R. 1313; for the text of these powers of attorney, Exhibits In. Ex. 13, P. Ex. 65; as to the negotiations with the Bureau of Internal Revenue, R. 1308-09, 1312-19, and Exhibits In. 14, P. 64, P. 71; as to plaintiff's September, 1946, approval of Mr. Polk's tax work, Exhibit D-37A.)

(e) Plaintiff's proposed finding No. 6 reads:

"6. The offer of settlement made by defendant to the Commissioner of Internal Revenue, as stated in this Court's opinion, was made in the plaintiff's name but without its knowledge."

This statement to be accurate should read:

"The offer of settlement made by tax counsel to the Commissioner of Internal Revenue to settle the tax liability of the group for the years here in question was made on behalf of the group and in plaintiff's name, as the Treasury Regulations require, and without prior consultation with plaintiff."

(See as to the circumstances of the offer of settlement and its terms, R. 1339-40 and Exhibit In. 14.)

(f) Plaintiff's proposed finding No. 7 reads:

"7. Said offer of settlement was made in February, 1947. Subsequently defendant's tax counsel

first notified the plaintiff thereof. Thereafter plaintiff and defendant agreed upon a stipulation to be entered into in the present case in the form of plaintiff's Exhibit 7. Thereupon the intervenors applied to the court herein for a temporary restraining order enjoining and restraining the plaintiff and defendant from consummating the proposed settlement. Upon the hearing of said application for a restraining order defendant presented to the court the proposed stipulation referred to above, and after the hearing this Court, on August 29, 1947, made and entered its order in the form attached hereto. Thereafter, said stipulation was signed by the parties and filed herein on September 5, 1947."

This statement to be accurate should read:

"Said offer of settlement was made February 11, 1947. On April 2, 1947, tax counsel notified plaintiff in writing of the offer of settlement and advised plaintiff of its right to withdraw the offer at any time prior to its acceptance by the Commissioner of Internal Revenue. Plaintiff threatened to revoke the power of attorney of tax counsel and to withdraw the offer of settlement but following conferences between counsel, a stipulation was agreed upon (Plaintiff's Exhibit 7). The intervenors applied to this Court for a temporary restraining order to enjoin the completion of the settlement. A hearing was held on the application on August 26 and 27, 1947, and an order entered

denying the application. The stipulation of the parties was signed and filed on September 5, 1947.”

(See as to the date of the offer of settlement, Exhibit In. 14; as to the date and terms of the notification to plaintiff, Exhibit P. 68, and as to the terms of the stipulation, Plaintiff’s Exhibit 7.)

(g) Plaintiff’s proposed finding No. 8 reads:

“8. The settlement with the Bureau of Internal Revenue was not entered into in the manner prescribed by Section 3761 of the Internal Revenue Code. In carrying out the settlement the claim for refund was not withdrawn, as stated in the opinion, but the Bureau of Internal Revenue gave notice of its disallowance of the claim for refund and placed the returns for 1942, 1943 and the first four months of 1944 in its closed files. The statute of limitations did not thereafter run until August 26, 1949 (eleven days before the rendition by this Court of its opinion herein) against an action against the Commissioner of Internal Revenue to enforce the claim for refund, but by reason of the settlement agreement no such action was instituted. The statute of limitations did not run against imposition of a deficiency assessment for 1943 taxes until June 10, 1948, or against the imposition of a deficiency assessment for 1944 taxes until June 15, 1948, but by reason of said settlement the Commissioner of Internal Revenue made no deficiency assessment.”

This statement to be accurate should read:

“The settlement was effected on the basis of the offer contained in tax counsel’s letter to the Commissioner of Internal Revenue dated February 11, 1947 (In Ex. 14), and the tax liabilities of the affiliated group for the period from 1942 to and including the first four months of 1944 were settled and determined on the basis of the returns as filed.”

(See as to the terms of the settlement, Exhibit In. 14, P. 7 (Ex. A. thereof.))

The statements contained in proposed finding No. 8 as to section 3761 of the Internal Revenue Code and as to periods of limitation are not statements of fact. They are conclusions of law on questions which have never been presented to this Court for decision. Nor is there any evidence whatever in the record as to why no deficiency assessments were made or proceedings taken on the claim for refund. The settlement made such proceedings unnecessary and defendants suggest that findings should not be made on questions which were not before the Court at the trial, on which no evidence has been presented and which are irrelevant.

(h) Plaintiff’s proposed finding No. 9 reads:

“9. Plaintiff at no time had any conferences, discussions or communications with the Bureau of Internal Revenue or any officer or agent thereof

relative to the returns, claim for refund or settlement.”

This statement to be accurate should read:

“All negotiations, conferences, discussions, and communications with the Bureau of Internal Revenue in connection with the returns, the claim for refund and the settlement were conducted by tax counsel. All the parties to this action approved the tax settlement.”

(See as to the negotiations with the Bureau of Internal Revenue, R. 1308-9, 1312-19, and Exhibits In. 14, P. 64, P. 71; and as to plaintiff's approval of the settlement R. 914 and Exhibit P. 69.)

(i) Plaintiff's proposed finding No. 10 reads:

“10. The evidence discloses no fraud committed by defendant's tax attorneys on the Bureau of Internal Revenue in connection with said tax settlement. The Bureau of Internal Revenue was motivated in agreeing to the settlement by its judgment as to the propriety of the claim for refund and of the tax returns with full knowledge of all pertinent facts.”

This statement to be accurate should read:

“The evidence discloses that the Bureau of Internal Revenue was informed as to all pertinent facts in connection with its consideration of the

tax settlement and there is no evidence that the Bureau was in any way deceived or misled.”

(See as to the negotiations with the Bureau, R. 1308-09, 1312-19, and Exhibits In. 14, P. 64, P. 71.)

III.

Defendants object to plaintiff's proposed conclusion of law on the grounds that it is entirely inconsistent with the decision of the Court and inconsistent alike with the Court's pre-trial order and the stipulation entered into by plaintiff and defendants, and upon the further grounds stated in defendants' objections to the interveners' motion for reargument and to amend findings of fact and conclusions of law.

Dated: November 18, 1949.

Respectfully submitted,

/s/ ALLAN P. MATTHEW,

JAMES D. ADAMS,

ROBERT L. LIPMAN,

BURNHAM ENERSEN,

Attorneys for Defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company.

McCUTCHEN, THOMAS,
MATTHEW, GRIFFITHS
& GREENE,
Of Counsel.

/s/ EVERETT A. MATTHEWS,
PILLSBURY, MADISON &
SUTRO,
MILBANK, TWEED, HOPE &
HADLEY,

Attorneys for Defendant, The Western Realty
Company.

Receipt of copy attached.

[Endorsed]: Filed November 18, 1949.

[Title of District Court and Cause.]

ORDER UNDER RULE 25(c) DIRECTING
THE JOINDER OF PARTY PLAINTIFF

Upon motion of the plaintiff and of Alexis I. duP. Bayard as Receiver of plaintiff The Western Pacific Railroad Corporation, and it appearing that on October 19, 1949, by order of the Court of Chancery of the State of Delaware, in and for New Castle County, said Alexis I. duP. Bayard was appointed and now is the Receiver of plaintiff corporation to take charge of its estate and effects and to collect the debts and properties due and belong-

ing to it with power to enter his appearance in, and to prosecute and defend in the name of said corporation or otherwise, all suits and proceedings which may be necessary or proper for the purpose aforesaid, including the present action; and good cause appearing therefor,

It Is Hereby Directed that said Alexis I. duP. Bayard as Receiver of The Western Pacific Railroad Corporation be joined, and he is hereby deemed to be joined, as party plaintiff herein, and shall be so denominated in all papers hereafter filed herein.

Dated: November 28th, 1949.

/s/ LOUIS E. GOODMAN,
District Judge.

Receipt of Copy Attached.

[Endorsed]: Filed November 28, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Findings of Fact

Plaintiff having proposed findings of fact in addition to the findings contained in the Court's opinion filed herein on September 6, 1949, and the defendant having objected thereto, and the Court being now satisfied that all facts necessary for decision are found in the opinion of September 6, 1949, now adopts by reference all such findings as its formal findings of fact in this cause, for all purposes as if the same were fully set forth herein.

Conclusions of Law

The Court concludes that the plaintiff shall take nothing herein and that the defendants shall have judgment in their favor for their costs of suit.

Dated: November 28, 1949.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed November 29, 1949.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 26508-G

THE WESTERN PACIFIC RAILROAD COR-
PORATION, and ALEXIS I. duP. BAYARD,
Receiver,

Plaintiffs,

and

MEREDITH H. METZGER, HENRY OFFER-
MAN and J. S. FARLEE & CO., INC., a
Corporation,

Interveners,

vs.

THE WESTERN PACIFIC RAILROAD COM-
PANY, et al.,

Defendants.

JUDGMENT

The above-entitled cause having been tried before the undersigned Judge of the above-entitled Court, without a jury, the parties appearing throughout the trial by their respective counsel, and the cause having been submitted to the Court for decision,

It is by the Court ordered, adjudged and decreed that the plaintiffs, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, be denied all relief, and that the interveners be denied all relief, and that the plaintiffs recover

nothing and the interveners recover nothing from the defendants or any of them.

Defendants are allowed costs against the said plaintiffs and interveners, as follows:

Defendant Western Realty Co. in the sum of \$2936.76.

Defendants The Western Pacific Railroad Company, et al., (other than Western Realty Co.) in the sum of \$3300.60.

The Clerk is directed to enter this judgment forthwith.

Dated: Nov. 30, 1949.

/s/ LOUIS E. GOODMAN,
Judge.

Entered in Civil Docket Dec. 1, 1949.

The within draft of judgment prepared by counsel for defendants, The Western Pacific Railroad Company, et al.

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ ROBERT L. LIPMAN,

/s/ BURNHAM ENERSEN,

Attorneys for Defendants The Western Pacific
Railroad Company, et al.

Approved as to form, as provided in Rule 5(d).

/s/ MAURICE E. HARRISON,

/s/ HERMAN PHLEGER,

BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiffs The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, as Receiver.

Approved as to form, as provided in Rule 5(d).

ROGERS and CLARK,

/s/ WEBSTER V. CLARK,

Attorneys for Interveners.

Approved as to form, as provided in Rule 5(d).

/s/ EVERETT A. MATHEWS,

PILLSBURY, MADISON &
SUTRO,

MILBANK, TWEED, HOPE &
HADLEY,

Attorneys for defendant
Western Realty Co.

[Endorsed]: Filed Novemer 30, 1949.

[Title of District Court and Cause.]

ORDER GRANTING MOTION
TO AMEND JUDGMENT

Judgment was heretofore entered in this cause in favor of defendants and for their costs of suit. Thereafter defendants filed cost bills totalling \$25,-907.76. The Clerk then proceeded to and did tax the costs at a total of \$6,237.36.

Plaintiff and interveners have filed and argued two motions: (1) To amend the judgment by striking out the award of costs to defendants and instead ordering each side to bear its own costs and (2) To modify the Clerk's order of taxation by disallowing all items allowed by him except those totalling a nominal amount.

The items now sought to be stricken consist of (a) cost of original daily transcript of trial testimony; (b) cost of copies of daily transcript; (c) cost of original depositions.

There is substantial doubt as to the propriety of the questioned cost items. Furthermore, after hearing the arguments and studying the memoranda submitted, I am of the opinion that I should not have awarded costs to defendants. It appears to me that, under all of the circumstances of this litigation, it would be more just if each side were to bear its own costs.

Consequently, the judgment may be amended accordingly. It is therefore unnecessary to decide the motion to review the Clerk's taxation order.

Prepare order accordingly.

Dated: January 11, 1950.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed January 11, 1950.

In the United States District Court, for the North-
ern District of California, Southern Division.

No. 26508

THE WESTERN PACIFIC RAILROAD COR-
PORATION and ALEXIS I. duP. BAYARD,
Receiver,

Plaintiffs,

and

MEREDITH H. METZGER, et al.,

Interveners,

vs.

THE WESTERN PACIFIC RAILROAD COM-
PANY, et al.,

Defendants.

AMENDED JUDGMENT

Judgment having heretofore been rendered on No-
vember 30, 1949, and plaintiffs and interveners hav-
ing on December 9, 1949, moved to amend the

judgment, and said motion having been granted, the judgment is amended to read as follows:

It Is by the Court Ordered, Adjudged and Decreed that the plaintiffs, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, be denied all relief, and that the interveners be denied all relief, and that plaintiffs recover nothing and the interveners recover nothing from the defendants or any of them.

It Is Further Ordered, Adjudged and Decreed that defendants do not recover costs against plaintiffs or interveners or any of them, and that each party shall bear its, his or her own costs.

The clerk is directed to enter this judgment forthwith.

Dated: January 13, 1950.

/s/ LOUIS GOODMAN,
District Judge.

The within draft of amended judgment prepared by counsel for plaintiffs.

/s/ HERMAN PHLEGER,
/s/ MOSES LASKY,

BROBECK, PHLEGER &
HARRISON,

Attorneys for plaintiffs, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, as Receiver.

[Endorsed]: Filed January 13, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given this 8th day of February, 1950, that the Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment rendered in this action as amended by Amended Judgment entered herein on January 13, 1950, pursuant to order of January 11, 1950, in favor of defendants and against plaintiffs.

/s/ HERMAN PHLEGER,

/s/ MAURICE E. HARRISON,

/s/ MOSES LASKY,

BROBECK, PHLEGER &
HARRISON.

/s/ FRANK C. NICODEMUS, JR.,

/s/ A. PERRY OSBORN,

/s/ MAHLON DICKERSON,

/s/ NORRIS DARRELL,

/s/ LEROY R. GOODRICH,

Attorneys for Plaintiffs and Appellants, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver.

[Endorsed]: Filed February 8, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., plaintiffs in intervention above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment rendered in this action as amended by Amended Judgment entered herein on January 13, 1950, pursuant to order of January 11, 1950, in favor of defendants and against plaintiffs and plaintiffs in intervention.

Dated: February 8, 1950.

/s/ WEBSTER V. CLARK,

ROGERS and CLARK,

/s/ DAVID FREIDENRICH,

/s/ JULIUS LEVY,

Attorneys for Plaintiffs in Intervention and Appellants Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., a Corporation.

[Endorsed]: Filed February 8, 1950.

[Title of District Court and Cause.]

DESIGNATION BY APPELLEES OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL

Appellees, The Western Pacific Railroad Company, and The Western Realty Company, defendants in the above-entitled action, designate the following additional portions of the record, proceedings and evidence to be contained in the record on appeal in the above-entitled action:

1. Reporter's transcript of hearing on motion of interveners to intervene, April 7, 1947.
2. Reporter's transcript of Pretrial Conference, January 11, 1949.
3. Reporter's transcript of oral argument at conclusion of trial, February 23, 1949.
4. Defendants' Objections to Findings and Conclusions Proposed by Plaintiff dated November 18, 1949, and filed same date.
5. All entries made by the District Court Clerk in the Civil Docket of the U. S. District Court, Northern District of California, Southern Division, pertaining to the above-entitled action.

6. This designation.

Dated: February 16, 1950.

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ ROBERT L. LIPMAN,

/s/ BURNHAM ENERSEN,

/s/ WALKER LOWRY,

Attorneys for Defendant, The Western Pacific Railroad Company, et al.

/s/ EUGENE M. PRINCE,

/s/ EVERETT A. MATHEWS,

PILLSBURY, MADISON &
SUTRO,

Attorneys for Defendant,
The Western Realty Co.

Receipt of copy attached.

[Endorsed]: Filed February 16, 1950.

[Title of District Court and Cause.]

CIVIL DOCKET

1949

Sept. 6—Order Judgment for Defendants as will appear more fully in opinion this day filed.

Nov. 30—109. Filed Judgment that plaintiffs and interveners recover nothing and defendants to recover their costs as determined. Entered Dec. 1, 1949.

Jan. 11—Order judgment may be amended and each side to bear own costs, per order signed this date. (Goodman)

In the Southern Division of the United States District Court in and for the Northern District of California

Before: Hon. Louis E. Goodman,
Judge.

No. 26,508-G

THE WESTERN PACIFIC RAILROAD CORPORATION,

Plaintiff,

vs.

THE WESTERN PACIFIC COMPANY, et al.,
Defendants.

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT

Monday, April 7, 1947

Appearances:

For the Plaintiff:

LEROY R. GOODRICH, ESQ.

For the Defendants:

WEBSTER V. CLARK, ESQ.,

JAMES D. ADAMS, ESQ.,

ALLAN P. MATTHEW, ESQ.,

EVERETT A. MATHEWS, ESQ.

* * *

The Court: In other words, these corporations having been advised that the law permits, or saves

them some money in taxes, now want the Court to decide how the saving shall be divided.

Mr. Clark: Precisely. And without the benefit of any other facts, the matter is passed up to the Court to decide who is entitled to this refund.

Frankly, in that view of the case, on the basis of the allegations in the complaint, it is our opinion that the Court could do nothing but to award the moneys to the operating company in accordance with certain defenses which are set forth in its answer, and in view of the fact that the moneys for which refund is claimed were paid by the operating company and the tax saving was with respect, only in large part, to moneys which it had earned. I say on the basis of this complaint as it is filed in the court, your Honor, the Court, could do nothing but to decide the matter, it seems to us, in favor of the operating company.

* * *

The Court: The applicants for intervention are stockholders of which company?

Mr. Clark: Holding company, the company whose tax loss was used. What could have been done and what the directors should have done, may it please the Court, is to have forced an apportionment by agreement of the tax loss from the subsidiary companies before permitting the use of the loss belonging to holding without any benefit to its stockholders.

* * *

The Court: The plaintiff in the case is asserting

that it is entitled to the benefit of this tax situation?

Mr. Clark: Yes, but it does not allege facts necessary in this complaint to entitle it to a recovery, in our opinion.

* * *

The Court: Mr. Clark, how could it make any difference ultimately as a matter of law with respect to the allocation of this tax refund as to whether or not the James interests had the control in both companies? The Court can't decide how the money should be allocated.

Mr. Clark: I think so, your Honor.

The Court: How could that be?

Mr. Clark: Because if we are going to get into a discussion of the merits, all the declaratory relief complaint says is that these companies were consolidated companies during the years in question, or affiliated corporations within the meaning of Section 141, and that is conceded, because if there is any recovery at all, it must have been. Then, the declaratory relief complaint says there is no statute or regulation apportioning benefits or tax benefits or liabilities among members of an affiliated group. Therefore, we place it in the lap of a court of equity to decide who is entitled to the recovery.

On that state of the matter, may it please your Honor, it must be perfectly obvious, and I think the gentlemen who filed this complaint, it must have occurred to them, so far as the Court is concerned, a fair apportionment of the benefits would be to the

fellow who pays the tax, and that is the position of the railroad company, represented by Mr. Mathews and Mr. Adams.

* * *

[Endorsed]: Filed Nov. 9, 1948.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 26508-G

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Plaintiff,

and

RUSSELL M. VAN KIRK, HENRY OFFER-
MAN and J. S. FARLEE & CO., INC., a Cor-
poration,

Intervenors,

vs.

THE WESTERN PACIFIC RAILROAD COM-
PANY, et al.,

Defendants.

PROCEEDINGS ON APPLICATION FOR
TEMPORARY RESTRAINING ORDER

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT

Monday, August 25, 1947

Counsel Appearing:

LEROY R. GOODRICH, ESQ.,

For the Plaintiff;

ROGERS & CLARK, by

WEBSTER V. CLARK, ESQ.,

DAVID FRIEDENRICH, ESQ., and

POMERANTZ, LEVY, SCHREIBER, by

JULIUS LEVY, ESQ.,

Attorneys for Interveners Russell M. Van
Kirk, Henry Offerman and J. S. Farlee
& Co., Inc.

ALLAN P. MATTHEW, ESQ., and

JAMES D. ADAMS, ESQ.,

For the Defendants.

Mr. Clark: May it please your Honor, this matter involves the presentation to your Honor of a temporary restraining order and order to show cause on the part of the interveners Van Kirk, etc. The occasion which in our opinion, may it please the court, necessitates such action is a proposed settlement between the defendants in intervention and the United States Government, concerning the tax saving and refund claim which, your Honor may

remember, constitutes the subject matter of this action.

May I just briefly review the facts, because this matter was before the court only upon our application to intervene some months ago: The interveners are preferred stockholders of the holding company called Western Pacific Railroad Corporation, which at one time owned all of the stock of one of the defendants in intervention, Western Pacific Railroad Company. As your Honor will remember, the company was in reorganization in this court from approximately 1935, I think it was, until the last of 1943, and in that reorganization the stock of the operating company, the corporation in reorganization, was declared valueless by the United States Supreme Court, confirming the plan of reorganization confirmed by this court. Thereafter, in 1944 the directors of the holding company, we assert, by virtue of domination and control over them by certain interests, caused a consolidated income tax and excess profits tax return to be filed on behalf of itself, the holding company, and all of these defendants as affiliated companies within the meaning of that section of the Internal Revenue Code, and in that return there were set up as a loss on the part of the family of companies the loss of the value of the stock held by the holding company in the operating company, which loss was the result of the reorganization. That loss resulted in a tax saving for the years 1943 and 1944 to the operating company of \$10,100,000, and, in 1942, a claim for refund in the amount of \$4,200,000.

There was a suit brought in New York by Mr. Levy's firm—and he is here and will present this to your Honor—in which an apportionment of that tax saving on that refund claim was sought to be recovered for the holding company. It had given up its tax loss, received nothing for it, and the use of that loss resulted in that \$14,000,000 saving to the operating company out here, and various subsidiaries. The New York action was pending in the Southern District for New York. Motions to dismiss had been overruled when the corporation appeared in this jurisdiction and filed the action which we roughly called an action for declaratory relief during the time we discussed the application to intervene, and in that action the corporation, which company we contend is dominated by the operating company and various other interests, simply stated to the court in the complaint in the declaratory relief action that this loss had been so used that the saving had resulted and it wanted the court, in the exercise of its equitable powers, to declare what apportionment there should be, inasmuch as there was no statute or rule of law which covered the matter, and in that declaratory relief complaint, if it can be properly called such, there was no allegation concerning the domination which had caused the misuse, we contend, of this tax loss to the detriment of the stockholders of the holding company. Therefore, Mr. Levy's firm associated Mr. Friendenrich and myself to prepare a petition for intervention in the declaratory relief action,

which we did, and in that we allege what we think are the controlling facts in the case, and that is the matter your Honor heard, and you granted us the right to intervene, and we filed a complaint in intervention.

Now, so far as the California action is concerned, may it please the court, two of the defendants in intervention, that is, the corporation, being the company on behalf of whom our people seek to intervene as minority stockholders, and another subsidiary called Western Realty Company, represented by Pillsbury, Madison & Sutro, have filed answers. The operating company, represented by Mr. Matthew and Mr. Adams, and their firm, have filed a motion to strike, which is now set on your Honor's calendar for September 15th, and we may possibly ask you to continue that further, pursuant to stipulation of counsel. But meanwhile, all these parties, except the plaintiffs in intervention whom we represent, it seems, have or are about to consummate a settlement with the Government on or pertaining to this very tax-saving refund claim which constitutes the res of the subject-matter of the action, and (Mr. Levy is familiar with this and will describe it to your Honor) the settlement is of such a nature that it will stultify us and place a part of this fund possibly beyond the reach of interveners or the corporation in the event it is consummated, and this restraining order, which we intend to present to your Honor, has for its purpose to restrain these parties from consummating

that settlement, and particularly from giving the Government a release on the refund claim of \$4,200-000, which to our mind is a portion, at least, of the res to which certain technical defenses in the suit before your Honor do not apply.

May it please your Honor, I would like to present to your Honor Mr. Julius Levy, of New York, whose firm appears of counsel on the pleadings, and I would like to move the court to admit Mr. Levy in this district for the purpose of this particular litigation.

The Court: Very well, Mr. Levy may be admitted.

Mr. Levy: Thank you, your Honor, for this privilege. I have come a long way from New York, and we have done it only because we consider this particular aspect of the case of great importance, as great in importance as the necessity for our intervention in the corporate action. In fact, it is our opinion, and perhaps your Honor's when you have heard all the facts, that what has been done here is a further step in the course of conduct between these corporations which has evidenced the domination and control of the conflicting interests, at the expense of the corporation for the benefit of the company.

We were aware of the facts which were pleaded in the complaint going to the question of domination and control, and your Honor may recall that one of the strong elements in that chain of factual circumstances has been that throughout the years, when the consolidated tax returns were being filed,

the corporation and the company were represented by one tax counsel of the firm of Whitman, Ransom, Coulson & Goetz, of New York, and for a large period of that time the corporation and the company had one firm of general counsel representing both companies, and since the reorganization has concluded the corporation's president has, by retainer or contract, via Whitman, Ransom, Coulson & Goetz, been working for the railroad company, and another one of the corporation's officers, the secretary, is employed in the firm of Whitman, Ransom, Coulson & Goetz, and in addition to that Mr. Coulson is the trustee of a foundation which owns 40 per cent of the stock of our corporation, but unfortunately most of which is common stock and is so far under water as to be worthless, and at the same time 20 per cent of the railroad company, which, as your Honor may well take judicial notice of, is a fine, going, substantial concern, and it has been the duality of allegiance, as we see it, that resided in tax counsel which supposedly were able to disassociate themselves from their entanglements as to be able to press our claims and at the same time press the railroad company's claims.

One further factor I would like to advert to as background is this: In this very action one of the answers submitted on behalf of Western Realty Company, one of the defendants, is signed by Whitman, Ransom, Coulson & Goetz as their attorney, and it openly and frankly states that the corporation is entitled to no part of these tax savings. With that in mind, and having the feeling that this tax

matter with the United States Government, must sooner or later reach the stage where the parties are sitting across the table and talking about it, we dispatched a letter to Whitman, Ransom, Coulson & Goetz and the corporation and we stated in that letter that because of these background circumstances we felt that the corporation did not have that independent aggressive representation to which it was entitled in the course of those negotiations and, therefore, we suggested that we be permitted to participate in those negotiations, and that at least we be advised at what stage they had reached and what has been going on.

Well, we did get answers to that, and the answers were ultimately a flat rejection of our request, but it produced this much: We were invited to a conference with Mr. Polk, of Whitman, Ransom, Coulson & Goetz' firm, who, by the way, reiterated that his job was that of the tax work, and please don't ask him about what the other end of his firm was doing in connection with the internal quarrel here. We had that conference with Mr. Polk, and we were there advised that a settlement offer had been made by Mr. Polk to the United States Government, and that settlement offer was this: You, the United States Government, sustain the tax returns for 1943 and 1944 under which we, the railroad company, save ten million dollars, approximately, in taxes which we did not pay; at the same time reject the tax refund claim which is made by the corporation.

Now, if you were to view the settlement as being a settlement for ten million dollars of a fourteen million dollar tax claim and that were all there were to it——

The Court: The claim for refund was made by the corporation?

Mr. Levy: The claim for refund was made by the corporation as the parent company, and in the normal course of events, had that claim been allowed, the check would have come to the corporation. I will embellish that a little further as I go along. But at the outset, to make our position clear, I would like to say had this involved nothing more than the question of a ten million dollar settlement of an overall claim of fourteen million dollars, we would probably say, "Well, by gosh, if you can get ten million dollars out of a fourteen million dollar claim, O.K., let's take it and forget the balance. At least that is money in the bank rather than litigation."

That is not what this settlement involves. Our objection is that the form in which it is couched gives to the railroad company an advantage in this litigation which may prove the death knell to the corporation's claim on the merits, and I will try to demonstrate to your Honor how that comes about, how we see it: To begin with, the validity of the tax returns and the tax refund claim are all premised on the same question——

The Court: Is this matter contested? Or are you going to make some order by consent?

Mr. Clark: If it please your Honor, I was down

in Fresno trying a case when Mr. Levy got in touch with me last Friday. I immediately phoned your Honor's secretary to make an appointment to present to your Honor a restraining order and an order to show cause, restraining the consummation of this settlement until it could be heard on its merits, and a preliminary injunction passed upon; and the appointment I got with your Honor was at four o'clock this afternoon. Now, so that we would not be in the position of coming out here and asking your Honor to sign a temporary restraining order and an order to show cause without notice, I telephoned to Mr. Adams and to Mr. Goodrich and to Mr. Matthew and told them we were coming here, so that they would know what was being done, and be able to voice any objection. The thing we are presenting to your Honor is simply a restraining order and an order to show cause, returnable just as soon as your Honor can order it. I put the date next Friday in——

The Court: Does the other side object to the issuance of a temporary restraining order?

Mr. Adams: Yes, your Honor, we do.

The Court: That is all I wanted to find out. If we are going to argue this matter—I had no idea that this was to be a hearing on an application for a preliminary restraining order. My secretary told me it was some matter that could be presented in chambers, as I got it.

Mr. Clark: That is precisely what I suggested to her, that we simply present the restraining order

to your Honor, explain the matter to you, and have the arguments set.

The Court: If the other side is going to object to my issuing a temporary restraining order to stop them from settling a claim that involves ten million dollars, I do not see why you would want to hear it at four o'clock in the afternoon.

Mr. Clark: It is only the urgency of the matter, your Honor, because we understand the settlement is imminent.

The Court: I could have set it earlier this afternoon.

Mr. Clark: Four o'clock in the afternoon was the earliest date I could get from your secretary.

The Court: I had some other matters on, but I thought counsel wanted to come and talk with me about some order in chambers, and so I said, "Come out at four o'clock." I would be reasonably sure of being through with my calendar.

Mr. Levy: I think I can have this presentation over in five minutes.

Mr. Adams: May I say, your Honor, we have not seen the form of order or any papers, but have appeared in response to the courtesy of counsel in designating this time and place, and we should, of course, like to be heard in opposition to the motion, but we would like to see the motion. We have not seen any papers yet.

The Court: I understand counsel are applying to the court for a temporary restraining order, with an order to show cause fixing a date at which the motion for a preliminary injunction may be argued.

Mr. Clark: Precisely, your Honor.

The Court: Instead of applying to the court *ex parte* for that restraining order they have notified you. Of course, I do not know whether it would even be proper to apply for a temporary restraining order in an action that is pending unless counsel appeared without notice. That is beside the point. You are here now. You wish to oppose the issuance of the temporary restraining order?

Mr. Adams: Yes, your Honor, we do.

The Court: That means you are going to argue the question as to whether the temporary restraining order should issue.

Mr. Adams: We should like to present argument.

The Court: We will go as far as we can until about five o'clock. If we can't finish it we will go over. I have a criminal case starting tomorrow morning.

Mr. Clark: If we could get some expression from these gentlemen, your Honor, as to the imminency of this settlement perhaps we can get together on a time when the whole thing could be properly argued and the application for preliminary injunction passed upon. But as far as I was concerned, I was in Fresno trying a case. Mr. Levy was advised of these facts in New York, flew out here, and we are approaching your Honor at the earliest appointment I could get from your secretary with a restraining order and an order to show cause, bringing up the entire question. Our only purpose is to stop this settlement.

The Court: You want to stop the settlement from being consummated?

Mr. Clark: Until your Honor passes upon our right to preliminary injunction, precisely, because we feel it prejudices us to the extent of some four million odd dollars in the litigation which is before your Honor.

The Court: You mean you are not satisfied with the settlement they are making?

Mr. Clark: Mr. Levy was making that point.

Mr. Levy: I was just about to get to that, your Honor.

The Court: I asked Mr. Levy if it was a corporation's claim for refund that was pending.

Mr. Clark: That is right.

The Court: You are intervening on behalf of the stockholders of the corporation?

Mr. Levy: Correct.

The Court: So it is your own claim for refund, that is, it is the corporation's claim for refund that is now being settled?

Mr. Levy: It is not just that simple your Honor. The overall picture here is that there was a tax saving for ten million dollars for two years. That is an inchoate thing. It was simply a saving of taxes which otherwise would have been assessable against the railroad company out here, but they were never paid, and it was the use of the corporation's loss that I adverted to. In addition to that, if your Honor please, there is a fund, or will be a fund, or would have been a fund represented by a claim for refund for another year for \$4,200,-

000. The justification for both the saving and the claim for refund is the same.

The Court: Then what you are objecting to is the settlement of the claim on an improper basis as to amount?

Mr. Levy: May I go on with that, your Honor? I was just coming to that, and that is the heart of this application.

The Court: The only reason I interrupted was, I was trying to find out the nature of this proceeding.

Mr. Levy: Perhaps I was somewhat long-winded in giving you the background. Here is the precise question we are urging to you at this time: We say this proposed settlement will give to the railroad company a "clean bill of health" on their ten million dollar savings which have accrued for the years 1943 and 1944. At the same time, the Government will reject the four million dollar claim for refund. Now, our objection is this——

The Court: Ten million is the claim for refund——

Mr. Levy: No, the ten million is saved by reducing the taxes that would have been paid from ten million to zero, by reason of off-setting these losses.

The Court: I see now what you are getting at.

Mr. Levy: Let us see what the effect of this settlement is. The effect of this settlement is the railroad company, which had ten million, still retains possession of that ten million dollars. On the other hand the corporation, which had a claim

for refund, which had it been paid would have been paid to it by the United States Government, was to receive nothing under this settlement, so that the entire res, after this settlement is consummated, if it should be, will be in the possession of the railroad company; none of it will be in the possession of the corporation.

Now, why is that of any significance? It is significant in this case——

The Court: The corporation claims an interest in that ten million as well as in the four million?

Mr. Levy: Yes, by the litigation, but it has no physical possession of it. And why is that important to this litigation? The railroad company, in response to the corporation's action to recover an interest in that ten million dollars worth of savings that the railroad company has, the railroad company, in its answer, has set up certain defenses. It has said, 1, you are barred from suing us as a result of a bankruptcy order; 2, you are barred from suing us because your statute of limitations has run; and, 3, you are barred from suing us because laches has prevailed. Therefore, if we have to sue the railroad company in order to assert an interest in that ten million dollars, then before we ever get to a decision on the merits, the court may say, "Well, we are very sorry, your equitable claim is a fine one, but you are defeated by three technical defenses, or any one of them." If, however, in addition to the corporation's having ten million dollars worth of savings we had four million dollars worth of refund in our till, then if the railroad

company wished to get that back from us it would have to sue us, and in fact in this very action the railroad company has a counterclaim where they say that this claim for refund is in the name of the corporation; the check would be paid to the corporation, the corporation may run off with it, so we ask that we get judgment against the corporation for the amount of the refund. Now, without possession of that refund money, without possession of the proceeds, the railroad company would never have to sue us and we would then be in a position where our entire action to share in the contested res may well be defeated because of technical defenses going to our right to sue. That is why I say our objection is not to the settling of a fourteen million dollar tax claim for ten million dollars; our objection is to the form in which that settlement is couched. In the normal course, if we had two companies paddling their own canoes, the settlement would take the form as follows: We have a fourteen million dollar claim. We are settling it for ten million. Ten-fourteenths will go to the railroad company and ten fourteenths will go to the corporation, and if you have a fight as to who is entitled to what, take your case to court and let the court determine the matter. That is the position that we say we ought to be in even when there is a settlement. I would like to ask my adversaries here why there could not be this internal shuffling between the parties whereby some part of that ten million dollars, ten-fourteenths of four

million, is paid to the corporation, and ten-fourteenths of the ten million is paid to the company. Why can't that be arranged as the method of settling instead of leaving the entire res with the railroad company and leaving the corporation with nothing? And then to add insult to that, to have the railroad come in in our lawsuit and say, "You fellows are barred from suing us. Now that you have the ten million and we have nothing, you can't sue us." That is why we say we need a temporary restraining order and a permanent injunction here. We say that this court should restrain these parties from so settling this case unless they are willing to reshuffle the amount of the settlement so as to leave with the corporation its proportionate share of this refund claim and leave the company its proportionate share of the tax savings.

The Court: Suppose this is the way the Government wants to make this settlement?

Mr. Levy: If that is the way the Government wants to make the settlement, there is nothing to prevent the parties from doing what the right thing requires them to do.

The Court: Then if that is the case, why do you need a restraining order? Does not a court of equity have the inherent power to look into the transaction, irrespective of the form of settlement and say that they would not have the right to make these technical defenses?

Mr. Levy: When you have a lawsuit that is full of hazards, you hate to add another one. We have

the hazard of whether a court of equity has the right to ignore the statute of limitations or the bar of the bankruptcy order.

The Court: What I mean to say is, can't a court of equity say while a settlement was made in this form, that in reality it was a settlement of 10/14ths of the whole claim, and therefore, that being the case, the railroad corporation is in the same position in a court of equity as it would be had it part of these funds in its possession? If that is the true fact of the matter, if that is the truth of the matter, why would equity be hamstrung by some such technical situation as you suggested might be availed of?

Mr. Levy: I think it would in this respect: Your Honor has to decide a lawsuit. We have a claim against the defendant. The defendant says, "You have no right to sue. You have no right to inquire into the merits." And if we have no right to sue, then we do not have the opportunity to bring into play these equitable doctrines, because we are barred from asserting the claim in this court, and since they have possession of the res, then there is no way by which we can urge them other than by a lawsuit.

The Court: Who represents the corporation in this litigation?

Mr. Levy: Mr. Goodrich.

The Court: Mr. Goodrich represents the corporation and Mr. Matthew represents the company.

Mr. Matthew: And Mr. Adams.

Mr. Adams: Mr. Matthew represents the Western Realty Company.

The Court: Pillsbury, Madison & Sutro represent the railroad company, and you three gentlemen represent the interveners. Is there any objection on the part of the corporation and the company agreeing now, despite the form of the settlement, that they will treat it as if it were a 10/14ths settlement of the whole?

Mr. Adams: May I respond to that, your Honor? I think the statement of counsel, so far as it goes, might have been supplemented with reference to a stipulation, the precise text of which would be of great interest to your Honor, and it should be read. The stipulation (and I say this subject to correction in precise detail) as to its terms provides that as between the parties to the litigation—and this is made between the corporation, on the one hand, and the Western Realty on the other hand, and our clients on the third hand—it provides that this settlement with the Government shall be without prejudice to the respective claims and defenses of the parties to the litigation, except that all those claims and defenses shall now be deemed to relate to a tax saving as reduced by the settlement with the Government. It provides specifically and more particularly that the claim for refund shall be deemed to have been allowed in the proportion which it bears to the net reduced amount tax saving, and that the tax saving for the subsequent years shall be deemed to have been reduced in like proportion. It further provides, and in particular,

that the defenses shall not be imperiled, waived, or prejudiced, nor shall the claims be imperiled, waived, or prejudiced except and all thereof now relate to a fixed amount of tax saving or a determinable amount, in consequence with the settlement with the Government. I think your Honor will find that the stipulation, to put it in more brief terms, reads substantially to the text which your Honor has announced from the bench.

The Court: That stipulation has been entered into?

Mr. Adams: That stipulation has been agreed to between counsel for the corporation, Mr. Nicodemus, Mr. Goodrich, and counsel, that is, ourselves, for the company, and I understand counsel for the Western Realty Company will enter into the stipulation. I think, however, that it should be said that that stipulation was prepared and presented to the Board of Directors of the corporation by ourselves, representing the company, that is, through Mr. Goodrich, and that the Board of Directors of the corporation had before it our agreement to make the stipulation before the board approved the corporation continuing with the settlement with the Government. As Mr. Levy has stated, there is no argument between any party to this litigation about the desirability of determining the tax liability with the Government in an amount of about 10/14ths or 5/7ths of the possible total saving, and this stipulation was entered into at the instance of counsel for the corporation, who came to us shortly

ago and stated that they thought that the settlement with the Government, without an agreement of that sort, might prejudice their position. We, on our part, thought that an agreement that the settlement should prejudice neither the one party nor the other, would be an appropriate stipulation to make, and we resisted at all times, and will continue to resist, any effort to obtain or extract an advantage for another party as against our client, but we feel that this stipulation does not have that effect, either as to us or as to the corporation. I have answered your Honor somewhat fully.

The Court: Would the language of that stipulation cover the point that Mr. Levy makes that the corporation would be in the same position as if it had, as a result of the settlement, a part of these funds in its possession in respect to any defenses that might be urged?

Mr. Adams: I might at this time hand up to the court a copy of the stipulation and then read from it, if I may.

The Court: Mr. Levy, do you think that stipulation does not cover the matter?

Mr. Levy: Yes, sir, I think it does not.

Mr. Adams: You saw the stipulation?

Mr. Levy: I saw it.

The Court: That is really the crux of the matter.

Mr. Goodrich: That is the crux of it.

Mr. Levy: May I ask a question? I would like to ask both of my adversaries this hypothetical question: If the judgment of this court after the settlement is consummated should be that we are

barred from suing because of laches, or limitations, or the injunction order, will we get physical possession in our till of ten-fourteenths of \$14,200,000, or will the railroad company retain that?

Mr. Adams: Do you wish an answer, Counsel?

Mr. Levy: I do.

Mr. Adams: I will attempt to respond to the question asked, your Honor, by stating that in our view the corporation has not the slightest claim, right, or interest in any of this tax saving. We think it all belongs to the company.

Mr. Levy: Mr. Goodrich, whom do you represent?

Mr. Adams: I am speaking for the railroad company, and my name is Adams.

Mr. Levy: I am sorry.

Mr. Adams: We anticipate such may be the judgment of the court, which is the judgment we shall urge the court to give. We contend that each of the defenses which we make on the score of the bar, laches, and limitations are sound and are not technical, and we contend also that upon the merits and in equity there is no claim before this court to any part of this tax-saving which has the slightest justification, other than the right of our company, the taxpayer. That will be and will continue to be our position, and it has been made clear also to the directors of the corporation, and counsel for the interveners is aware of it. We contend that the corporation is in duty bound and is fiduciary in respect to the matter of obtaining this settlement with the Government.

The Court: Why was the settlement with the Government made on the basis of the ten-million-dollar claim allowed and the four million dollars rejected? Is there some special reason for that? Mr. Levy seems to think astute counsel for the parties arranged that so that they might anticipate this claim that he is now making.

Mr. Adams: I would like to make a complete disclaimer as to that, and I think the stipulation will satisfy your Honor that no such thought was in the minds of the parties. The tax settlement was made by Mr. James K. Polk, who is an eminent specialist in the tax field, and who has handled tax matters. That is a matter which has not been before your Honor. That is something to do between the taxpayer and the Government. The reasons why the settlement took this form are undoubtedly technical reasons having no relation whatever to the issues involved in this controversy, and as counsel put it, in equity (and as I think the stipulation puts it to the same effect) the settlement in the form in which it is made is not to have the effect assigned by counsel of an exaction on the part of our client as against the corporation, another party; nevertheless, we do contend and will continue to contend that the corporation has not the least vestige of any meritorious claim to any part of this money, and I would like your Honor to feel clear that that is so. We recognized when Mr. Nicodemus——

Mr. Levy: May I say I do not think the question has been answered.

Mr. Adams: That doubtless was occasioned by the nature of the question, Mr. Levy. I will stop shortly. I just want to say we recognized when Mr. Nicodemus and Mr. Goodrich came to us, as they did some while back, and said they were apprehensive that the form of the settlement with the Government might be prejudicial to their clients, while we claim their clients had no rights, they were counsel in court presenting a claim of right, and so we endeavored in the stipulation to deal with them on the basis that they claimed they had a meritorious right which we denied, and that stipulation, as your Honor will see, I think worked the thing out so that their claims of right are not lost in consequence of the form of settlement, but our defenses to those claims were not lost, either.

The Court: Mr. Goodrich, are you of the same view as the interveners?

Mr. Goodrich: We are of the same view as the interveners to this extent, your Honor, that our claim on behalf of the corporation is put forth in complete good faith, that the corporation is entitled to all the tax saving which results from the losses suffered by the corporation. What happened was that the 1942 consolidated return was filed and taxes paid.

The Court: I remember that part of the presentation of this matter which was made before me some time ago, but what I am specifically inquiring about is this: Are you in accord with the interveners' claim that the form of this settlement, no

matter whether it was activated by the exigencies of the settlement, itself, or by a desire to gain some advantage, do you or not agree that the corporation's rights have to be protected by stipulation or otherwise so that the settlement negotiated by the company will not have the effect of depriving the corporation of some legal rights in connection with the litigation itself?

Mr. Goodrich: When we approached Mr. Matthew's office on this matter we raised the identical points that Mr. Levy has raised, namely, that here was a claim for refund of four million two hundred thousand dollars, which if it was paid by the Federal Government would necessarily be paid to the Western Pacific Railroad Corporation, to our clients. On the other hand, as for 1943 and a portion of 1944, no tax was due if the entire loss sustained by the corporation were allowed by the Federal Government; but to safeguard itself from the possibility of paying taxes, the railroad company set up and now has earmarked in a separate fund \$10,100,000. We suggested to Mr. Matthew's office, Mr. Matthew and Mr. Adams——

Mr. Levy: When was this, Mr. Goodrich?

Mr. Goodrich: This is not dated. Do you recall the exact date, Mr. Matthew?

Mr. Matthew: About three weeks ago.

Mr. Levy: The date of the form of settlement is February 11, 1946, which was submitted to the United States Government; in other words, the corporation had submitted a form of offer to the United

States of America before it had gotten a vestige of consent from the railroad company that any settlement by them would be entered into.

Mr. Goodrich: May I correct that briefly, Mr. Levy? My understanding is that an offer of settlement on behalf of the group of corporations was made to the Government by Mr. Polk, who was acting as tax counsel for the entire group, and had been for sometime previously. As to whether the Government would accept that offer, or not, was still doubtful, but finally the Government officials in the Bureau indicated that they might be willing, if we waived the claim for refund for 1942, to allow all the losses for 1943 and a portion of 1944. It still remained open for the corporation as to each one of the corporations in this group to consent to the waiver of the claim for refund or not, and as late as several days after we were in Mr. Matthew's office working out this stipulation. It was still possible for the corporation to withdraw its power of attorney to Mr. Polk and withdraw its consent to the waiver of claim for refund. We went to the counsel for the railroad company and presented to them the problem, in a sense, that Mr. Levy has raised here, and we told them that we did not feel that we could recommend to the board of directors of the railroad corporation a continuance of their consent to the proposed settlement unless we could work out some program by which the interests of the railroad corporation, as well as the company, and the Western Realty Company, as to all the

balance of the fund would be preserved proportionately, exactly as it would have been if we had refused to go through with the settlement or the refund had actually been made by the Federal Government. It was on that basis that this stipulation was worked out, and I think it is only fair to the court to say that on both sides counsel worked very diligently and earnestly to try to present to this court that matter clearly. All we could do was agree that this stipulation could be made if the claim for refund was rejected by the Government on our consent. We attempted to work out a stipulation that would be clear and simple for this court, and that would preserve in precisely the same status every position, every right, every defense, every possible cause of action that any of the parties might have, but would preserve it in a fund that was lowered proportionately by the waiving of the claim for refund, so that what we have now, subject to all the rights and all of the defenses that we had before, is a claim for a little over \$14,000,000, reduced to a little over \$10,000,000. That is my understanding of the meaning of this stipulation. I am perfectly willing to state that at any time to the court, and I think that Mr. Adams will say it is their understanding of the stipulation from the standpoint of the railroad company.

The Court: Does the stipulation meet the precise question Mr. Levy raises, that is, that it is stipulated that the settlement on this basis would have the same effect upon the rights and obligations of

the parties as if 10/14ths of this money were in the possession of the corporation? That is the point, isn't it?

Mr. Levy: I want to concretize it with this question: If this action should be dismissed on any one of the three technical defenses, who will be left with the physical possession of 10/14ths of the \$4,200,000? I think that can be answered flatly.

Mr. Adams: If this lawsuit is lost, your Honor, by interveners or by the corporation upon any ground, the railroad company will keep the money.

The Court: There is no doubt about that.

Mr. Goodrich: There never was any doubt about it.

Mr. Levy: Oh, your Honor, on any ground. In other words, what Mr. Adams has just said is that if you sustain the defense of laches, limitations, or the injunction order, we will not have possession of 10/14ths of \$4,200,000. Now, had this refund claim been settled as it should have been, so that we would get possession of 10/14ths of \$4,200,00, then if this lawsuit were defeated on any one of those three technical grounds, we would be in possession of the 10/14ths of \$4,200,000, and the railroad company would have to come and sue us without the benefit of a bar of the statute of limitations, without the benefit of a bankruptcy order. They would have to sustain on the merits that they are entitled to the 10/14ths of \$4,200,000, and that is the crux of this discussion, your Honor.

The Court: Do you agree or disagree with that, Mr. Goodrich?

Mr. Goodrich: I do not agree, your Honor, because I think this stipulation means very simply that as to 4/14ths of the remaining \$10,100,000, both the railroad corporation and the railroad company are in precisely the same position that they would have been in if the claim for refund had been allowed. As to the remaining portion of the \$10,100,000, we are likewise in the same position that we would have been in if the claim for refund had been allowed. All that happens is that the aggregate amount is reduced, but proportionately to the balance that is left, which is now \$10,100,000, in proportion to the two different segments of that reduced fund. My view of this stipulation is that it says very plainly that the parties agree that as to each part, the 4/14ths and the 10/14ths, the position of the parties is unchanged.

Mr. Levy: That is not Mr. Adams' position. He has been frank enough to so state.

Mr. Adams: If I may state my position again, just to make sure I do not make a misstatement about it, we consider ourselves bound by the Stipulation, all its statements, and all its intendments. I had understood the question to be that if we were successful in this lawsuit in obtaining a judgment against these parties upon any ground, would we keep the money, and of course the answer to that is we would, and we have it.

Now, I had understood Mr. Levy to have asked a question earlier which I did not answer, and I will try to state the question and, Mr. Levy, see if

I am correct: Your question is, whether this stipulation would result in money coming into the hands of this corporation. Is that your question?

Mr. Levy: That was not my question. May I ask it again, your Honor? It is crucial to the issue here.

The Court: I understand it.

Mr. Levy: Apparently Mr. Adams does not, although I thought I had by his answer. The question is this: Under this stipulation, if the court on the trial should determine that the plaintiff, the corporation, is barred from asserting its claim against the railroad company because of laches, limitations, or an injunction order, who would be left with 10/14ths of \$4,200,000? Will the railroad company retain it in its possession, or will the corporation say, "We have that 10/14ths. Come and sue us if you want it"?

Mr. Adams: I had better try to answer that in this way, your Honor, if I understand it correctly: The question now presented is whether if this court should determine that the claims of the intervener or the corporation are barred by any of these affirmative defenses in the nature of a bar, who would be left in possession of 10/14ths of \$4,200,000? All right, it seems to me, your Honor, the answer to that question fairly is that I am being asked now the effect *res adjudicata* of a judgment not yet announced by the court. I have no doubt but that this court in this proceeding is going to determine the force and effect, validity or invalidity of all

the several claims of the parties who are before the court. This is a court of equity. I think it is going to determine the whole controversy. I think when it has done so our views will prevail, we shall have judgment; but laying that aside, I think the question asked by counsel just now is academic in the sense that he is suggesting a judgment shall be pronounced by this court which will not be determinative of all the issues.

The Court: No, I do not quite get the situation that way, Mr. Adams. If this litigation concerned only the money having to do with the railroad company's operations, and that is all that was involved, you might be able to defeat that by one of those technical objections, and that would be the end of it. However, as I understand it, this litigation involves not only that \$10,200,000, but a claim that was filed by the corporation for \$4,000,000. Now, Mr. Levy argued that that is a claim of the corporation, and as a result of this settlement, which is really 10/14ths of \$4,000,000, the corporation is waiving its \$4,000,000 claim so that he has no res at all, that he would be entitled to get as a result of the settlement, and therefore he argues—I am not attempting to decide it now, but it seems to me it is plausible at any rate—the effect of that settlement that these two companies are going to make would be the company would be advantaged and the corporation would be disadvantaged because it would not have the opportunity to meet the technical defenses, which it could not meet in this entire res

that it claims it is entitled to, 10/14ths. He does not want the form of the settlement to put the company in the position of being able to defeat the action on the ground that it would not be able to defeat it on if the res were divided in proportion to the settlement that is being made. That I take it to be his point.

Mr. Levy: Exactly.

The Court: You say the settlement with the Government eliminates the corporation's claim and that is the way the settlement, itself, came about. You have asserted that. It is evident to me from what has been said, Mr. Levy and his associates are skeptical about that. They think maybe you maneuvered it that way. I do not say that that is so, but I get the impression from the arguments. If this be an equitable proceeding, I think everybody's rights ought to be protected so that no maneuvering or agreements that are made with the Government may bring about the defeat of the claim, without being given the opportunity to be heard. It may still be that that is the way the Government wants to settle it, and that is the advantageous way to do it, and the tax people have evolved this plan, which is a way to get this \$10,000,000 settlement out of the Government. On the other hand, I do not feel that I should necessarily restrain the settlement. I think maybe the thing might be worked out by some stipulation being entered into as a condition for not issuing or not stopping the settlement, because it may be an advan-

tageous settlement. I do not know. I do not want to make any agreement for the parties. They should make their own agreements. You might think this over a little bit, gentlemen. I am sorry, but I have to leave at five o'clock today. I have to catch my train. I had no idea this was going to take so long. If you want to come back tomorrow morning at nine o'clock I will hear you from nine to ten, but I have to go on with a criminal case. See whether you can't work the matter out a little further.

Mr. Adams: May I say, your Honor, of course it would not be the position of our clients to have taken any elicited or improper measures in connection with this transaction with the Government by which to obtain an advantage, and that is the furthest thing that was from our mind, and you may be assured, your Honor, that the form the settlement took was a form dictated by the practical necessities of transacting business with the Government. I think your Honor will wish to examine the stipulation, because I think your Honor will find——

The Court: I will take this stipulation home with me and read it over. Do you gentlemen wish to come back at nine o'clock tomorrow?

Mr. Clark: Your Honor, I would like to leave with you the original affidavit by Mr. Levy which forms the basis of this motion.

The Court: Have your opponents got copies?

Mr. Clark: I will give them copies right now once we file it, and I will ask your Honor to read it in connection with the stipulation

The Court: Has each side got copies of what you have handed me? Both sides will have copies of what has been handed to me is that correct?

Mr. Clark: Yes, your Honor.

The Court: Will you be here at nine o'clock tomorrow?

Mr. Clark: If we could have the engagement of these gentlemen that nothing further will be done than has been then perhaps we could set this for some day later in the week, which will be more convenient to your Honor.

Mr. Adams: Your Honor, it would be misleading certainly on our part to enter into such an engagement, when in our view the transaction with the Government is already complete, as in our view it is.

Mr. Clark: We had better go on at nine o'clock tomorrow, your Honor; because that has not been our understanding.

The Court: Maybe you will have further discussions with respect to this stipulation. I will continue the hearing until tomorrow.

(The further hearing of the matter was thereupon continued until tomorrow, Tuesday, August 26, 1947, at 9:00 o'clock a.m.)

August 26, 1947, 9:00 o'Clock A.M.

The Court: Do you want to present this matter further, Counsel?

Mr. Levy: Yes, your Honor, I would like to advert to a few items. Firstly, I would like to state to your Honor last evening my associates and I

drew up what we thought the stipulation in this case should contain. We have presented to our adversaries a copy of it, and I would like at this time to present your Honor with the original for your examination. (Handing a document to the court.)

If your Honor wishes, I will reserve my remarks until you have had an opportunity to examine it.

Your Honor will recall during the course of yesterday's argument I propounded a question to my adversaries, which to my mind represents the crux of this controversy on this application. The question was simply this: In the event this action is disposed of on the technical defenses, will the corporation retain possession of 10/14ths of the claim for refund, approximately three million odd dollars? In checking the transcript we found that either the question has not been answered, or Mr. Adams has answered the question in the negative, that is, that if the action is so disposed of after this settlement has been consummated, and in spite of the stipulations which have been drawn, it will be the railroad company which will have possession of that three million dollars. Now, if on the other hand, after the lapse of an evening, both of my adversaries should agree that the stipulation which they drew at least was designed to accomplish the result so that the corporation would retain that three million dollars, then, as I read it, the stipulation does not accomplish that result, but lawyers can sit down and we can draw a stipulation which will accomplish a satisfactory result to all parties as well as to your Honor, and that stipulation which

I have presented to you we think does it in clear, unequivocal language, so that there can be no further debate in the future as to whether it does or does not.

We stress this necessity for clear, unequivocal language I think not out of an excess of suspicion or caution. We have related the background facts that we think make it necessary for us to be in this proceeding. Your Honor will recall that the corporation never brought an action against the railroad company to share in these tax refunds and tax savings until our stockholders brought the action in the Southern District of New York. Years had elapsed since the consolidated tax returns have been filed, since the claim for refund had been filed; never had the corporation taken any action. It was only after we had launched the action in the Southern District of New York that the corporation took any action, and I believe the record which we have established in our depositions in the action in the Southern District of New York shows that it was our action in New York which caused the corporation to bring this action in California.

Let us carry that a step further: Take the very stipulation which has been submitted by Mr. Goodrich and Mr. Adams. Your Honor will notice that the only parties to that stipulation, although it be a stipulation in this action, are Mr. Adams, Mr. Goodrich, and the other defendants. The plaintiffs in intervention, who have contributed most to the commencement of this action, and the pressing of

this claim, were not advised of the stipulation, were not consulted in its draftsmanship, and were not even to be made parties to it. That makes me suspicious, and that makes me insistent on caution and clear language.

Furthermore, the original offer of settlement to the United States Government was made in February, 1947, and it is not until three weeks ago that the corporation sits down with Mr. Matthew and Mr. Adams in an effort to arrive at a stipulation as to what to do with this settlement in the event that it is accepted, and in that intervening period, before these discussions had commenced, we had written a letter to the corporation and to Whitman-Ransom, stating we felt we should be participants in these negotiations, and at least we ought to be advised of what has occurred. In the face of that record it is our contention that this corporation will be prejudiced by the form of this settlement unless the settlement is so divided that we will retain our share of the proceeds as if the United States Government had paid us directly, as it would have done in the normal course. Then we will be prejudiced, because these affirmative technical defenses of the railroad company can not only defeat our action with respect to what they have retained but will defeat our right to the entire amount of the tax savings since the action will involve only what they possess. We will be left with what the lawyers like to call the right without the remedy, and it is as good a way to be dead as any.

I would just like to point one further thing out to your Honor: In the corporation's complaint in this very action the corporation details the fact that there is a tax saving and a claim for refund, and it says, "We wish to submit to the court the question of allocating both of those as between the parties and determine the rights of the parties should it be found the corporation would be entitled to get the refund proceeds from the Government," and then as part of its relief the corporation says, "We pray that the parties hereto be enjoined and restrained from disbursing any funds in or coming into their custody or possession and constituting the refunds and reserves referred to in this bill of complaint, except upon the order of this court."

Now, what this settlement in its present form is doing is in actual fact transferring from the corporation to the railroad company the claim for a refund as reduced by the settlement. Now, the change of heart that has brought this about we cannot understand, but we can readily see the great prejudice which will result to the corporation if that kind of transfer is permitted, and we submit that the requirement, the damage, the injury is great enough so that this court at this time should sign the temporary restraining order, and we hope will ultimately sign the injunction pendente lite to prevent this transfer and the resulting prejudice.

The Court: I have not heard anything really from the plaintiff in this case, Mr. Adams. I do not wish to be sarcastic about this matter, but I would

think that if I were the attorney for the plaintiff I would be shooting off both barrels of my gun and would not be loath to accept advice from anyone who would help me maintain my cause, and I do not understand why the plaintiff in this action, who has brought the action, and who claims that the corporation is entitled, rightly or wrongly, to some part of this refund is not more enthusiastic about urging that very step be taken that would preserve the status quo, so that equity might properly resolve the rights of these parties. That is a subject that concerns me somewhat in this case. Here comes the intervener and he appears to be fighting both the plaintiff and the defendant in this case, and both parties, plaintiff and defendant, seem to be agreeable that the settlement should be made with the United States by which the claim of the corporation is disallowed and that of the defendant company is allowed, and that is a strange situation.

Mr. Adams: If your Honor desires, I would step down; but I take it my client is the adversary of both of these parties. My client is the party against whom this motion is brought, and it therefore is incumbent upon me, speaking for my client, to state the ground of our position. As far as the corporation is concerned, the corporation is our adversary, your Honor, and if your Honor would prefer to hear from the corporation first, of course, I would gladly step down for that purpose; but I think it should be borne in mind that your Honor has not yet heard argument in behalf of my client, the ad-

versary to these parties. We will, of course, present the argument.

The Court: What is the serious objection to having the matter so arranged, either by order of the court, by injunction, or some other adequate order in equity, so as to preserve the rights of all the parties in such a way that the court might proceed to adequately dispose of these claims, whether they be good, bad, or indifferent in an equity decree? How is anybody going to be hurt?

Mr. Adams: I can answer that question, I think, your Honor, but I think it would be most effective if I were to present my argument, because my argument, and the whole of it, is an answer to that question.

The Court: All right, go ahead.

Mr. Adams: I bear in mind the question which the court has asked is in effect. What is the damage or injury which might be done to Western Pacific Railroad Company, the party for whom I speak, in case the injunction or temporary restraining order now asked by the interveners were to be granted?

First, let us see what is the injunction which is asked, your Honor. These are the papers which were served upon us yesterday afternoon during the court session, and I read from the Temporary Restraining Order in the form as presented to the court: The injunction that is asked is an injunction against consummating with the United States Government the proposed settlement of the tax saving

for the years 1943 and 1944, and refund claim for the year 1942, as described in the aforesaid affidavit of Julius Levy. It is an injunction asked against releasing the United States Government or withdrawing or consenting to the rejection of, on behalf of the defendant in intervention corporation or otherwise its refund claim for the year 1942 in the approximate amount of \$4,200,000, or any part of such proposed settlement or compromise, or otherwise, and finally against taking any steps whatsoever to carry out or effectuate such proposed settlement, or the release, withdrawal or rejection of such refund claim.

That, your Honor, is the injunction which is asked in this case, and the answer therefore to your Honor's question becomes, I think, more clear upon looking at the injunction, namely, that \$10,000,000 is the damage or loss which our corporation would sustain, my client would sustain from the granting of the temporary restraining order that is asked here in court. I would like to make that clear to you, and for that purpose to state the origin of these tax claims so that the court may have the matter in mind. I think I may have failed heretofore in making that clear. We bear in mind that the defendant, Western Pacific Railroad Company, is the company reorganized right recently in the bankruptcy court in the Southern Division, Northern District of California; that that corporation represents a corporation which has been reorganized, reconstituted, as to which many claims hereto-

fore in existence have been barred, and swept aside. It is a fact (and it so appears from the reorganization plan) that the only parties who participated in and have any interest in the reorganized company were the Reconstruction Finance Corporation, the R. F. C., a Government institution, and the First Mortgage Bondholders. The corporation here in court was the parent company of our client, the reorganized railroad company. During the proceedings, in that reorganization proceeding, which lasted from 1935 to 1945—and in fact the final order was early in 1946—it had its day in court, and it urged in many forms, and repeatedly, the existence of equities belonging to it as against my client, the reorganized company. All of those claims were found to be wanting. The Interstate Commerce Commission found them to be without equity or value. The District Court of the United States in bankruptcy so determined. The United States Supreme Court, in 1943, affirmed the plan and repeated those determinations, and held that there was not enough in the properties of the debtor company, the Western Pacific Railroad Company, to make whole the first mortgage bondholders. That is the company of which I am speaking, and in consequence of the reorganization plan, and not otherwise, the corporation here in court arises out of holders of any equity or interest in this reorganized company. So then when we come into court we are aware of, and we feel, and we think we are correct in feeling we are responsible to the orders, the bars, and the injunctions of the bankruptcy court in respect to this reorganized

company, and it is one of our defenses in this litigation, and one upon which we believe we will prevail, that these claims have been barred, adjudicated, and swept out of existence, if there is any merit in them, by the effect of those reorganization proceedings.

The Court: These claims were during the reorganization proceedings? I notice they refer to the tax years 1942, 1943 and 1944.

Mr. Adams: Precisely. Now, the fact there is this: Beginning in 1920 or thereabouts, and for all the period in which consolidated income tax returns have been permitted, the affiliated group, consisting of the parent corporation, my adversary here in court, the defendant company, my client, and other corporations, members of the affiliated groups, filed consolidated income tax returns. That was the practice. During many of those years there was no income tax shown, no tax payable to the Government. During some of those years the corporation, my adversary, showed on its own account taxable income, but the railroad company, my client, showed on its account tax losses, with the result there was no income tax, no claim voiced then, your Honor, on behalf of our client that the corporation should pay our client on account of tax savings earned through our losses. Oh, no. It is only when the shoe is on the other foot that we hear that suggestion advanced, as we do here in court.

The Court: May I interrupt you to ask you this question: I take it that these consolidated returns covering the years involved, 1942, 1943, and 1944,

were returns that were filed jointly by the corporation and the trustees in reorganization?

Mr. Adams: That, I think, is the legal effect of it. The form in which the returns were filed, your Honor, was in the form of a return by the parent corporation, which is the form the regulations require, and of consents filed by each of the other members of the affiliated group, and as far as our client ever was concerned, informed, that consent was a consent signed "The Western Pacific Railroad Company."

The Court: The company and the corporation filed the joint returns during the period of the reorganization?

Mr. Adams: But I think your Honor's first statement is more accurate.

The Court: Was there any claim ever made during the reorganization proceeding of the same nature of the claim asserted in this suit?

Mr. Adams: That is one of our defenses.

The Court: You say it was?

Mr. Adams: No such claim was advanced. The fact is the trustees of the bankruptcy court were running this property during all the tax years in question, 1942, 1943, and 1944.

The Court: That is one of your defenses. I did not mean to interrupt your argument. I wanted to clarify my mind. One of your defenses is that because of the reorganization proceeding, this claim was washed out as a part of the process of reorganization, as it were, by reason of some fact, either failure to present it or some other ground.

Mr. Adams: Your Honor, this claim which rests before this court for \$14,400,000, and will now relate, in consequence to the settlement with the Government, to a claim for \$10,000,000, is a claim which could by no possibility survive the reorganization without having been presented to the reorganization court in total, and as to that defense there is no difference whatever between the refund claim and the balance of the tax saving which resulted from no tax being paid.

I would like to state, your Honor, a little bit more about the way these taxes worked out. In 1942 the trustees had taxable income. They ran the railroad and they made taxable income running the railroad for the court, and the trustees paid the \$4,200,000 out of assets belonging to them as trustees of the court. It is that money that the Government had. The corporation never contributed one dime, your Honor, to any of this. It is our client's money, the court's money that they are now seeking to make some distinction about. Now, the reason why the corporation is now the nominal party in the claim for refund is that under Regulations 104 and 110 relating to consolidated income tax returns, it is prescribed that the parent corporation, or the former parent corporation, as in this case, is the agent designated for all members of the affiliated group to make claims for refund. But the fact is, your Honor, that the moneys sought to be refunded was all trustees' money, paid by the trustees in discharge of their liability to the United

States for taxes, and claimed back by virtue of the loss relating to consolidated returns.

The Court: I recall this argument being made at the time of the intervention. I do not think there is any dispute about that. As I recall it, it was the intervener's claim that the plaintiff corporation was entitled to get something, because by its joining in and making this claim on the consolidated return, it resulted in a saving to the company which otherwise would not have been made, and therefore it was entitled to get something for that, and hence the invocation of the equity power of the court to decide what would be fair.

Mr. Adams: I think your Honor has stated it fairly, and one of the answers which we believe to be simple and to be most cogent to any such claim may be stated in this fashion: The corporation stands in this court, and the interveners stand in this court, speaking for the corporation, asking for money they never had, which never belonged to them, which they never paid. And upon what ground, your Honor? Solely upon the ground that they claim that they had the right to decide, by filing or not filing the consolidated return, whether or not my client would pay the Government. Now, that claim we contend, your Honor, appeals to no doctrine of equity. It is unconscionable in its nature. It is, in effect, a claim that, by some peculiar quirk of the tax laws, a party who has nothing to gain or lose, received under the tax laws a right to extract a price for determining whether or not

another party should pay the Government. There is no equity in that. Fundamentally, this claim advanced here by my adversaries is unconscionable. That is one of the bases.

Now, your Honor, what is the reason why this claim was never advised until, as counsel for the interveners have said, they, themselves, instituted litigation in New York? I cannot fully answer that, but I can suggest to your Honor that no one ever thought about it, and I can assure your Honor that when the trustees and this court employed Mr. Polk, as they did, the bankruptcy court, and when the bankruptcy court allowed the special employment of Mr. Polk as an expert, and when the bankruptcy court directed the trustees, as it did, to set apart the \$7,000,000 as a reserve against possible tax liability to the United States, and that the bankruptcy court did, so that the bankruptcy court was dealing with this important question of possible tax liability, I say when the trustees and the court did that, they never dreamed that the corporation would make such an unconscionable claim as this. No one ever thought about it, because in the nature of things it was not the sort of thing that anyone would expect to hear. In any event, the corporation was presently before the court. It was represented by eminent counsel, Judge Sloss. Judge Sloss carried to the United States Supreme Court the corporation's claims in equity, but he did not advance this claim. Oh, no, this claim is only brought up, your Honor, by stockholders representing, say, 2 per cent, whatever the per cent may be, of the

total amount of outstanding stock, which stock they purchased after this reorganization was well in process, and at prices which are a mere bagatelle. This is an afterthought suggested by the stockholders who now intervent in this court. I appreciate your Honor giving me the time, so to speak, to attempt in a rough way to state our own background of this thing.

I would like to come back to your Honor's question: What harm might be done if this injunction were granted? I stated to your Honor yesterday, and I have confirmed today through telephone communication with Mr. Polk, who is the attorney in charge, that this settlement with the Government is an accomplished thing. It has been done. It is a settlement agreement between the taxpayers and the Government. The Government and the taxpayers have determined their respective rights and liabilities. Those have been liquidated. The Government has kept \$4,200,000, an amount which our client or the trustees, as I stated, paid some years ago, and in return the Government has determined that that is all that it will keep on account of the tax liabilities for those three years in question, 1942, 1943, and 1944. I take it that in the absence of the United States as a party to this action any interference at this time with that settlement would be inappropriate. We suggest that to your Honor. But I would like to state in that connection right now, as well as I may, that the form the settlement took, your Honor, was not, as I said yesterday, in anywise

dictated or influenced by the relative positions of the corporation and the company. I think I can make that clear. I will try if your Honor will permit me. I asked Mr. Polk this morning the question, "What are the reasons why this settlement took the form of an agreement on the part of the taxpayer to relinquish the fund claimed and an agreement on the part of the Government to close the returns for the subsequent years as filed, bearing in mind the returns for the subsequent years as filed showed no tax, and that the refund claim was a claim for refund to the moneys previously paid?"

The reasons, Mr. Polk stated, are these: I will state them as well as I can and I think I can be accurate about them. By a settlement which is made in this form, under which the returns as filed are closed by the Government and the claim for refund is denied, the settlement is accomplished after the following procedures by the Government: First, a review by the revenue agent in charge, the agent in the field, supported by a review by his technicians. That is the first step the Government took in this matter.

The second was a review by what is called the Post Audit Section in Washington of the Internal Revenue Bureau; and there was a third review by the technicians of the Deputy Commissioner of Internal Revenue. Those were the steps to which the Government's processing of this matter went, and which resulted in the decision which has come down from the Bureau of Internal Revenue.

Now, then, had the settlement, instead of being in this form, been in the form of a proportionate allowance of the refund claim and a proportionate determination of sufficiency for the subsequent years, which is the suggestion counsel advanced, then in addition to that procedure the following would have been required:

First, another review by the opposite General Counsel of the Commissioner of Internal Revenue, followed by a recommendation by the General Counsel to the Commissioner of Internal Revenue with respect to that procedure and those determinations; the issuance of a public letter by the Commissioner of Internal Revenue with respect to those decisions; the rendition of a report to the Joint Congressional Committee on the Internal Revenue—I am not sure I have the precise title, but it is a Joint Congressional Committee. It has a special staff of its own, which then studies and reports to the committee upon the proposal. The report must lie with the committee for 60 days and, of course, at any one of those stages in the subsequent proceedings which would have been required if the settlement had taken the form which counsel suggests there could have been a decision on the part of one or more representatives of the Government that, instead of closing this matter, as it is now closed, it would be preferable for the Government to litigate. In case this claim were to be litigated it involves—I am trying to repeat Mr. Polk's words—your Honor will understand this matter I have

not handled—it would involve important and complex questions both of law and fact. For example, one question as to the date year of the loss of the corporation, which was fully argued and considered by those representatives of the Government who passed upon this matter, and other equally important and complex questions would have been involved. So that if the settlement had not taken this form it might well have been that after five years or more of litigation, extending through the United States Supreme Court, there would be a decision either that the taxpayer had \$14,000,000 to pay, or nothing to pay, or something in between.

The judgment has been expressed here by all parties concerned, your Honor, that a settlement of that potential tax liability at a figure of \$4,200,000, which is the effect of the settlement, is a wise and judicious thing. No one has questioned that. Furthermore, so far as the Government is concerned, the Government has acted through its several agencies after a full consideration of the matter, and has likewise determined from the Government's point of view it is a wise and prudent thing to appraise all of the chances, possibilities in this matter at the figure which the settlement determines. That is the background, your Honor, upon which I made my statement yesterday, or rather, it is a stronger background upon which I made my statement yesterday that this form of settlement was in nowise dictated by the considerations of the relative interests of the parties in-

volved. It was not. It has been criticized, however, because it may have that effect. But what does the criticism come to, your Honor? I take it your Honor has read the stipulation which we presented to your Honor yesterday. I take it that the stipulation which was presented to your Honor you have seen.

The Court: Yes, I read it last night.

Mr. Adams: Now, that stipulation was the result of some intensive work, occasioned by representatives of the corporation coming to us as representatives of the company, suggesting the very same problems that are now suggested in court by counsel for the interveners, and we think that stipulation answers those problems.

The Court: Has that stipulation been signed, gentlemen?

Mr. Adams: The stipulation is a binding compact in this fashion, your Honor: We prepared the stipulation. We submitted it to Mr. Goodrich, who forwarded it to his associate, Mr. Nicodemus, in New York. The Board of Directors of the Corporation were then meeting with respect to the matter of this income tax claim which was pending. We received from New York a request for a confirmation of our commitment to make the stipulation and we sent this telegram on the faith of which the directors of the corporation then acted. This is the telegram, your Honor:

“Responsive to request of Goodrich for answer to your yesterday’s telegram to Matthew, this will

confirm our commitment that if corporation approves and Government accepts pending proposal for settlement tax liability, we will join with you in execution of stipulation in form prepared by us and forwarded to you by Goodrich."

Mr. Levy: May we have the date of that telegram?

Mr. Adams: August 13th. That evidenced our commitment finally. That day the corporation acted upon it, and we are bound, your Honor, just as we are bound to the Government by the settlement of the tax liability made with the Government. So likewise we are bound to the corporation by the terms of the stipulation which we made.

The Court: It is your purpose to sign this stipulation when it comes back signed by the corporation, is that it?

Mr. Adams: Our purpose is to sign this stipulation, and we are awaiting the receipt of a formal document to be attached as an exhibit. That is the only reason it is not now signed.

The Court: I see. Exhibit A.

Mr. Adams: Yes.

The Court: The settlement agreement with the Government.

Mr. Adams: Yes.

The Court: I do not want to interrupt you, but time is running on in this matter. I take it, as I have read these two proposed stipulations, that the difference between the stipulation that the interveners want and the one you prepared is they want

to have this money in their possession. Off-hand, I would think that if they did not put it up they would not be entitled to have it in their possession, and the court would certainly have to adjudicate that they had some right. So I do not know whether I would be willing to go with counsel for the interveners to the extent that they would be entitled to have possession of this money.

Mr. Adams: May I say, your Honor, as to that matter I believe, however, if the interveners desire to press that question they could bring before your Honor in regular course upon motion and upon notice to enable us to prepare for it, any demand of the character suggested, and your Honor would pass upon it, but what we have before your Honor this morning in this quick fashion is a request for an injunction to interrupt the consummation of an agreement with the Government.

The Court: Which both sides agree is an equitable settlement of claims for the Government.

Mr. Levy: There would be no need for an injunction, your Honor, if the proper kind of stipulation was signed. May I address myself to your Honor's observation that since we did not put up the money we ought not to retain possession. To begin with, your Honor, you must keep in mind that we are at present, if there were no settlement, we would be the normal recipients of the Government's check on this refund claim, and then this court in the action which is pending before it would have to determine whether or not we are the owners

as distinguished from the possessors, and in that way, in the normal course we would be in the position of the possessor and the litigation would determine who was the owner.

The Court: Yes, but wouldn't you first have to establish in the equity suit the right to get a part of this money?

Mr. Levy: That is what we want to do.

The Court: Before you would be in the position of being the possessor of the money?

Mr. Levy: No.

The Court: If I were to order this agreement to be made, assuming I had the power to do it, I would be in effect transferring possession of this money before it was decided whether you were entitled to it.

Mr. Levy: No, sir. Let us pretend that there were no settlement. Let us pretend that the United States Government tomorrow said, "All right, gentlemen, we have examined your tax returns for the years 1943 and 1944. They are fine. You did not pay any taxes. You were not supposed to. We have examined your claim for refund. You are entitled to it."

Who would get the check? The corporation. So we are not asking your Honor to do anything other than what would normally occur in the normal course of events when we present a claim for refund to the United States Government. On the other hand, what this settlement does is this: It deprives us of possession of any part of that refund claim, and this is not merely a technical difference,

as your Honor appreciates, because of the technical defenses we could not get to first base in an effort to have you determine the merits, because the railroad company, after this settlement, having possession of the contested res, could defeat us on limitations, on laches, and on the injunction bar, and we would have the right, without the remedy.

The Court: I am not so sure that equity could not go through that in the final determination of this matter, and if the situation is as you say, and a settlement were made in such a form that the money would be paid to the claimant in refund, but because of the form of the settlement it is not made in that form, and then the technical defenses that you mentioned were made, a court of equity in making its ultimate determination of this matter, if it were necessary to pass upon these technical claims—I am not so sure that equity hasn't the power to look through that and say that that technical defense is defeated, if that is the only basis upon which the claim is defeated, and must be defeated because of the form in which this settlement of the claims with the Government was made. I do not think equity is so helpless as to be put in that position.

Mr. Adams: May I address myself to your Honor's question? I would like to read the provisions of the stipulation to which we have agreed. On page 2, paragraph B, is the following:

“More particularly the claim for refund of taxes paid for the year 1942 shall not be deemed to have

been abandoned by the settlement, but on the contrary the refund claim shall have been deemed to have been diminished in the proportion in which the aggregate of the tax savings involved in this action shall have been diminished by the settlement, and as so diminished to have been allowed, paid to the plaintiff as agent for the affiliated group designated in Regulations 110 and by the plaintiff paid into court, and the tax savings for the year 1943 and for the first four months of 1944 shall be deemed to have been diminished in like proportion. Nothing herein contained shall obligate any party hereto to make any deposit or payment into court."

Your Honor, nothing could be clearer than the statement here that it is agreed on our part that this tax settlement with the Government shall not have the effect of an abandonment of the refund claim as between the parties but, on the contrary, it shall be treated as if it had been proportionately allowed. That is all that is expressed there.

Mr. Levy: Mr. Adams, under this paragraph, if this court should determine that the plaintiff is barred by the statute of limitations, or the injunction, or laches, who will become the possessor of 10/14ths of four million two? The railroad company or the corporation?

The Court: That is not the point I just stated.

Mr. Adams: That is not the point.

The Court: The court could not, in my opinion, determine that the plaintiff is barred by these

technical defenses solely by virtue of the manner in which this claim for refund was handled, but if the plaintiff is barred by laches or some other claim in a manner and by virtue of facts and circumstances apart from the manner in which the claims with the Government were settled, then you would be barred. That is all there is to it. It would not make any difference whether you had the money in your possession or not.

Mr. Levy: By gosh, your Honor, here is a lawsuit that has hazards. Here are defendants and a plaintiff who sit down to make an agreement because they have got to make a settlement with the Government that they think is advantageous. Instead of taking the form, at least internally, whereby they eliminate a hazardous question, namely, the power of equity to ignore the statute of limitations, to ignore an injunction bar, they deliberately avoid taking that course. Now, what harm can come to these defendants if they give to the corporation what would normally come to it from the United States Government if this were not settled, or if the settlement took the usual form? Why should the court be burdened with a difficult problem?

The Court: They may be afraid of you New Yorkers and figure if you once get your hands on this money they will have a terrible time getting it away from you.

Mr. Levy: We are depositing it right in court, your Honor. It goes right into this court.

The Court: We might treat this matter this morning in the nature of a pre-trial conference as well as an application for preliminary injunction, and the court might, it seems to me, dispose of this matter, not by the granting of any injunction, because I do not think this court should, for the reasons stated, at any rate, prevent the consummation of what the parties agree is a sensible settlement of the claim to the Government, but I do think that the court can, treating this as a pre-trial matter, make an order in which, on the basis of the stipulation made or about to be made, the rights of the parties, in view of our discussion this morning, may be so protected that irrespective of the form in which the settlement of refund is made, the parties would be in a position, at least the plaintiff would be in a position, at least the plaintiff would be in a position to assert its claim urged in this suit with the same force and effect as against any technical defenses as it would have been able to assert those claims had it been in the possession of a portion of these funds, and in that way it seems to me equity would adequately protect the rights of all the parties. I do not see how you possibly could be not protected.

Mr. Levy: May I show you how, your Honor? I am trying to think along with you and this occurs to me: We are trying to project now what hazards may come during the course of this lawsuit, flowing from an unnatural way of making a settlement rather than a natural way.

The Court: Counsel has made a statement as to some reasons why in the settlement of the tax matter this was a more practical and adequate way of disposing of it.

Mr. Levy: But that did not prevent the parties from sitting down and saying, "O. K. We have both gotten the benefit of this matter. Now, let us give each the benefit of protecting each party to this litigation."

The Court: Doesn't the stipulation and the order of the court in which you are going to adjudicate the equity matters protect you? You would not get any advantage by my enjoining the consummation of this refund matter. You might kill the goose that laid the golden egg by doing that. But if this is the court that is going to adjudicate your rights eventually, and if this court makes a preliminary order in a pre-trial conference and it is backed up by this stipulation of the parties, which serves to eliminate any unconscionable procedural advantages that might accrue to your opponent as a result of the manner in which this refund settlement is made. That is a proper exercise of the powers of equity, and it serves to protect you, does it not?

Mr. Levy: Your Honor, take another look at that stipulation. The paragraph which was read to you creates a fiction. It says, "It shall be deemed this money had been paid," but it is not actually paid to the corporation. And look at the other provisions of the stipulation. It goes on

to say the defendants have all the defenses with respect to the tax savings as reduced by the settlement. In other words, whereas laches previously would not have applied to our right to retain what we had in our possession, under that stipulation it now does apply, because the amalgam of the contested res is reduced to the ten million one. Now, you say, "How can we be damaged otherwise?"

Let me pursue that a moment. Assuming each party had in its possession what it would normally possess if the Government had approved the tax returns and paid the refund, and assuming that this court evolved this theory of law, and it is not unusual, that the parties had no agreement as to how the tax saving should be shared. The railroad company possesses then ten million one. The parties have no agreement as to how the refund should be shared. That has been paid to the corporation by the Government. Now, equity, in view of the fact that the parties had made no agreement, equity says, "We will leave the parties where we find them." That is a possible conclusion of this court that I am hypothesizing, and if that were the conclusion of the court the railroad company would be left with the ten million one hundred thousand dollars and the corporation would be left with the four million two hundred thousand dollars. This settlement makes that conclusion impossible because only the railroad company has the \$10,100,000. We do not have the \$4,200,000, so that to our mind is a hazard.

The Court: Mr. Levy, I am not particularly impressed by that, because in making an adequate determination finally in equity the court is not going to make the kind of decision that has a definite purpose behind it and yet find its purpose defeated by the very thing that you are talking about.

Mr. Levy: But your hands are tied, your Honor.

The Court: I do not think equity's hands are tied in a matter of that kind. The court is going to make the kind of judgment that, if that obstacle presents itself, will take care of it, go through it.

Mr. Adams: I take it this court will command the situation and do justice and equity in its final decree.

The Court: I will say here, and you may treat this as a pre-trial conference and the reporter is taking it down, that both sides have presented their views, and I know what the purpose and object of the interveners is, that their rights may not be prejudiced to the procedural advantage of their opponents by virtue of this settlement. The court will make a pre-trial order, which counsel can prepare, to the effect that the court, in the ultimate equitable determination of this matter, will be guided by what has been said here this morning, by the stipulation of the parties, and that final determination will be made in this matter without giving effect in any manner, procedurally or otherwise, as far as the rights of the parties

are concerned in and to this fund, to the proceedings for refund with the United States. Now, what more would you need?

Mr. Adams: I take it, your Honor, that that order would run equally to the advantage and benefit of each and all of the parties.

The Court: Of course, I am not trying to determine the rights of either party at this time.

Mr. Goodrich: Your Honor, may I add this, that the very thing Mr. Levy has been contending for here is the thing Mr. Nicodemus and I went to Mr. Matthew's office to contend for, and our first request was that an amount of \$4,200,000 be laid aside and earmarked especially for us to distinguish possibly between these technical defenses applying to the money that had been paid in to the Government and the technical defenses that might apply to the money that had been reserved but not paid. The railroad company did not feel that it could do that, and we spent three days in the working out of this stipulation, and I think it was the consensus of the attorneys who were present that it had precisely the force that your Honor has expressed here, and that it preserved the situation exactly as it was, leaving it to the court finally to do equity among the contending parties. The fund is diminished by the settlement with the Government but proportionately to the balance that is left under this stipulation, as I understand it, the rights of the parties are precisely what they were before.

The Court: I think I adequately understand this matter. I know counsel might want to pursue it much further, but all that the court has before it is whether or not it should take some action at this time by way of extraordinary equitable order, and I feel that an order denying the application for restraining order upon condition that the stipulation that is represented to me is signed by the parties and is sufficient to protect the rights of the parties hereto, and that that, coupled with the statement in the nature of a pre-trial order that the court has informally made, and which may be reduced to writing, should be adequate to protect the rights of the parties.

Mr. Levy: Your Honor, may I ask whether Mr. Adams consents to that informal pre-trial order?

The Court: I have already made it. I do not think it requires Mr. Adams' consent. I think an order along those lines in the nature of a pre-trial order, reciting briefly the nature of the contentions of the parties and the intent of the court to preserve the rights of all parties, with the same force and effect as if this particular settlement and agreement with the Government had not been made, is sufficient to take care of the matter.

Mr. Levy: I am thinking of an argument to an appellate court based upon some contention that your Honor's order is erroneous, and if Mr. Adams feels it is correct I think he could so state for the record now.

Mr. Adams: The court has made the order and I understand it to be so.

The Court: Have you any objection to that?

Mr. Adams: I am not now certain, your Honor. I take it, though, your Honor's order in this proceeding is an interlocutory order such as other interlocutory orders are, and as the case develops before your Honor, your Honor will make further and additional interlocutory orders, and your Honor's order is an order and not a stipulation, and your Honor's reference to a stipulation is to the stipulation which we have agreed to enter into.

The Court: That is right. I am simply making the condition of the denial of the restraining order the execution of this stipulation.

Mr. Levy: Your Honor has broadened the stipulation.

The Court: I do not think it is proper to ask counsel whether they want to consent to some order the court has made. Somebody else might look at it differently, but it seems to me it is equitable and will protect the rights of the parties.

Mr. Levy: Thank you, your Honor.

The Court: I am sorry I could not give you gentlemen longer, but I have another trial on.

Mr. Clark: May it please your Honor, in that Western Pacific matter which was heard the other day, the parties have agreed upon a form of order which we think meets your Honor's views as indicated at the close of the hearing, and everyone has consented to it and I will pass it to your Honor to sign.

Mr. Adams: Your Honor will bear in mind that in agreeing with counsel as to his statement, when he said "consent," he means we approve the form of order; but your Honor said the order was not one made upon consent of counsel.

The Court: It seems to me to cover the matter.

Certificate of Reporter

J. J. Sweeney, Official Reporter, certifies that the foregoing 68 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ J. J. SWEENEY.

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE

Tuesday, January 11, 1949

* * *

The Court: I would like to interrupt you there a moment. From your point of view how important is the evidence concerning the so-called duality and domination issue in determining the legal question?

Mr. Clark: May it please your Honor, the intervenor believes that the issue of duality, if not essential to the cause of action, is of the greatest importance because, while it might well be as a

substantive question of law, and considering only the bare fact that the filing of the consolidated return and the use of plaintiff's corporation's stock loss as giving a right in the corporation, nevertheless if the directors representing the corporation were guilty of no dereliction, and that has simply been an arm's-length transaction between two companies properly represented, we think that there might be substantial doubt, may it please your Honor, that the Court could now go back and reappraise a good-faith corporate transaction. In other words, may it please the Court, the substantive question alone is the narrowest basis upon which this case could be decided. The facts are that instead of the holding corporation being represented by an arm's-length board of directors, the majority of its directors at the time of these transactions were employees of the defendant corporation, compensated by the defendant company; general counsel for the holding corporation was counsel for the defendant company; tax counsel for the holding corporation was likewise tax counsel for the defendant company; and each and all of those people were compensated solely by the railroad company. Now, in that view of the matter, your Honor, the holding corporation with respect to these transactions had no representation, and the interlocking directors and counsel between the two created the fact of the interlock resulting in these companies occupying a fiduciary relationship one to the other. And in addition to that,

may it please your Honor, you have these fiduciaries represented by identical counsel who, the evidence will show, advised one of them as to its rights, namely, the railroad company and not the other. Now, the result of that, if it please your Honor, is that on those facts the Court not only has the right but the Court has the duty to reappraise the transaction from the standpoint of fairness, and if the Court should find that transaction unfair, it has the right then to allocate the benefits to the respective company who is entitled to it. That is just on the merits.

The Court: Your point there is that it is necessary to present this evidence in this field of what you call duality of control because without it there might not be a cause of action?

Mr. Clark: Precisely. We believe it is essential to the cause of action, but should it not be, it at least, may it please your Honor, is the broadest ground on which a judgment in favor of the holding company can be supported, and we think it is a necessary ingredient in this case because of those other facts in this case.

The Court: What you are saying now is it was this domination and duality which produced an unfairness in the relationship that had its effect in the form of unfairness in the transaction with respect to these income tax returns?

Mr. Clark: The transaction, if it please your Honor, which resulted was, we contend, an unfair transaction from the standpoint of the holding com-

pany. The duality and domination entitles your Honor now to reappraise that transaction, and if you find it fair, to allocate the tax benefits to the parties in the proportion that your Honor considers fairness requires. The transaction itself is unfair inasmuch as on the filing of these consolidated returns a stock loss suffered by the holding corporation amounting to \$76,000,000 was used to offset the income of the railroad company and saved \$21,000,000 which it otherwise would have had to pay the Government.

The Court: I understand that. We have had some arguments in connection with this matter before. But I was wondering whether or not the unfairness of the transaction would not principally depend upon the nature of the transaction itself rather than upon who participated in it, why, and under what conditions?

Mr. Clark: Suppose, your Honor, that two independent companies were represented by arm's-length boards of directors and that they had sat down under those very circumstances and for whatever reason, and with full knowledge of the facts, the stock loss, the rights of the holding company not to file a consolidated return, had decided in their judgment—there being no showing of any dereliction on their part—that the proper thing to do was to file a consolidated return for old times' sake, let us say, and confer this benefit upon the railroad company. Now, if that were the case we have very serious doubt, if it please

your Honor, that these people, being competent persons all over twenty-one, acting at arm's length, and no dereliction on their part having been shown, we doubt very much that your Honor could step in at this time and reappraise that transaction.

That goes to the affirmative side of the case. In addition to that there are certain technical defenses here, the statute of limitations, laches, et cetera, to which the duality, let us call it, is the answer. So it also applies defensively as well as, we think, constituting an integral part of the case in chief, because, as opposed to the good faith example I have attempted to put to your Honor, let us take the facts of this case where there were no independent boards. There was almost a 100 per cent interlock right down the line, everybody being compensated by the railroad company. One of our directors, for instance, is a telephone operator in the New York office, director of the holding corporation, on the payroll of the company; with that kind of interlocking directorship represented by those companies, represented by the same tax counsel and the same general counsel, we have the facts respecting the mechanics of how this consolidated return was filed, amounting simply to this: that Mr. Coulson's firm prepared the returns which initiated this tax saving, and which set up the use of the corporation's stock loss, and that return was presented to Mr. Curry, our president, who was at the same time a vice president of the railroad company, who was given no advice whatso-

ever, made no inquiry whatever, simply signed his name; ergo, the railroad company saves for that year some \$8,000,000. In other words, the corporation was not represented, your Honor.

The Court: That is not exactly what I was thinking. We are only discovering this now from the point of view of trying to limit the issues and the evidence of the trial itself. Offhand it would seem to me, unless there was a cause of action that arises out of the transaction itself, it can't be transformed into a cause of action because the persons who have dealt with it were not nice people or even had bad motives. A cause of action either existed or it did not exist.

Mr. Clark: Right.

The Court: What you have to say might have some effect when meeting affirmative defenses because there you might have a question of estoppel, waiver or other matters that might prevent the assertion of some special defenses. But it would not be fair and right to allow the holding company to participate in the benefits of this tax refund; would not become right and fair because the people who handled them were grasping or otherwise did not conform to the standards that were considered proper.

Mr. Clark: Your Honor is quite right, and I have not made myself understood, apparently. The function of the duality is to enable your Honor to roll back the curtain and reappraise the transaction as though you were there the minute before

these returns were filed or accomplished in the manner I have described, and once that is done, then of course there has to be the cause of action or right in the holding company to these tax savings before your Honor can award them to them. The mere fact that there may have been a wrongdoing, duality or what have you, does not create a cause of action. Of course not. Now, once the duality rolls the curtain back so that your Honor has a right to remake the transaction from the standpoint of fairness, then of course our argument comes into play that under the spirit of the tax law the benefits, at least those flowing from the use of the stock loss, were rightfully the holding corporation's and not the railroad company's. Do I make myself clear?

The Court: Yes. I understand what you are getting at. I am not wholly convinced by it yet, but we have lots of time to get at that. It might be too confusing. After all, there are a lot of lawyers here and all of you have spent a lot of time on it and you want to throw a mass of documents and data in the lap of the Court on this question and we might be led astray or diverted into extraneous fields by these matters upon which there might not be any factual controversy at all.

Mr. Clark: No, so far as we are concerned, your Honor, and I have not got to that point—

The Court: Who these people are who were directors and all of that—I notice mention is made of that in some of the briefs—I suppose is no longer

a matter of controversy. They are what they were, and that is all.

Mr. Clark: That is right, and so far as the intervener is concerned, your Honor—I had not got to the point in the statement—it is immaterial to us whether the matter is handled in the way Mr. Phleger proposes, namely, by admissions of fact, which are supported by the documents, and therefore the admissions would eliminate the necessity for the documents, or whether it is handled as Mr. Adams suggests, by the stipulation of these exhibits in evidence. We do not care, because we think either way accomplishes the purpose. I was simply explaining to your Honor my initial reason for my having requested 450 exhibits because I was quite sure the defendant would not make admissions of fact which would result in the elimination of them. Now, I have not examined Mr. Adams' response, but I dare say on many of these issues he is not willing to stipulate, and I just point out that that means that many more exhibits have to go in.

The Court: I wonder if we can't find out whether there is a controversy as to whether or not there was this duality of control. Maybe the defendant does not dispute that.

Mr. Clark: Well, Mr. Adams does not dispute, I think, if it please your Honor, the bare fact of position, but he does very definitely dispute, and has throughout the case, any improper motive and he also has disputed the idea of the domination

or misuse of the control over the holding company by the James interests. Of course, I am attempting to answer for him.

The Court: When you say the "misuse," are you referring now generally speaking or to the matter of this tax problem?

Mr. Clark: With respect to these very transactions, your Honor.

The Court: Is your contention that one of the purposes and objectives of this duality of control was to deprive the plaintiff, the holding company, of its right with respect to possible refund of taxes?

Mr. Clark: With respect to these tax savings, yes, your Honor.

The Court: Was there something else you wanted to add in this preliminary discussion?

Mr. Clark: That is all from us at this time, your Honor.

The Court: What have you to say in this preliminary stage?

Mr. Adams: Your Honor was discussing with Mr. Clark the question, as I understood it, whether the claim of duality, domination and control had any materiality to this lawsuit. It is clear in our judgment that those claims have nothing whatever to do with whether or not the plaintiff has a cause of action. We agree entirely with your Honor's statement that there must first be a claim brought into court.

The Court: Mr. Adams, I was not intending

to indicate that was my view on it. I was trying to explore the matter to see if it does have that effect.

Mr. Adams: May I say that is our view. Perhaps I misunderstood your Honor's question as in effect a preliminary indication of the way your mind was working, but it is clearly the law that there must be a cause of action before there can be a derivative stockholders' suit for the derivative stockholders to come into this court attempting to speak in behalf of the corporation and, of course, the corporation must have a cause of action.

Now, as regards duality, domination and control, I should like your Honor to understand why it is that if there are issues entered in this case of that sort it is necessary for us to ask that the trial of that issue by upon the facts and on no other basis. As your Honor suggested, we have certain affirmative defenses in this lawsuit. One of them is the bar of the reorganization proceedings out of which all these transactions arose, in which all of these transactions of which complaint is made took place. And I understand that the plaintiff in this case, as well as the interveners, joined in the contention that these facts of so-called duality, domination and control afford to them a basis upon which to escape the bar of the reorganization. Likewise we have pleaded defenses of estoppel, of laches, of waiver, and we have facts to back those up, and I understand these contentions with regard to domination and control and duality are brought

forward in order to enable the plaintiff in this case to escape the effect of those defenses. That is my conception of the place that these tendered issues have in this lawsuit.

Now, with regard to those issues, your Honor—and I do not want to take the time to go into detail about this—but I would like to say there is one basic uncontrovertible fact about duality in this case that is wholly and studiously ignored in our adversaries' briefs and in our adversaries' presentation, and that fact is this, your Honor: There is and never was duality between my client, the reorganized Western Pacific Railroad Company and this plaintiff corporation. What our adversaries constantly do and it is illustrated by the statement that Mr. Clark just made when he said that general counsel for the corporation was also counsel for the railroad company, what our adversaries do is wholly ignore the basic difference between the reorganized company that was reorganized in Judge St. Sure's court and was put in possession of properties on the 1st day of January, 1945, as the vehicle for the effectuation of the plan of reorganization, and the old debtor company which went into reorganization on August 2, 1935, and which was at that time suspended, or rather on the 9th of November, 1935, when the trustees were appointed. In 1935 the old debtor company's properties became the properties of Mr. Thomas M. Schumacher and Mr. Sidney M. Ehrman, the trustees in the reorganization proceeding, and for

ten years Mr. Schumacher and Mr. Ehrman had title to the properties, owned the properties, had the income, had the tax liabilities, and the debtor company was a frozen instrument of the equity and represented very properly by the general counsel for the plaintiff corporation here in court, and in that form as a spokesman for the equity.

Counsel constantly referred to the relation that Mr. Nicodemus had to the debtor company, as if that were a relation to the reorganized company, when the fact is that Mr. Nicodemus' employment, as counsel, came to an end with the end of the reorganization. By the same token counsel spoke of duality in the relation to other directors of the holding company, when the fact is that relation was a relation brought into the reorganization in 1935, continued while Mr. Schumacher and Mr. Ehrman were the court's trustees, and was a relation of duality between the holding company and the court's trustees, but not with my client, the reorganized company. I want to make that clear to your Honor because that gives your Honor some view initially of one of the reasons why we contest, and we contest all the way through, any suggestion that there were in fact dual relations between these complainants, our adversaries, and my client, the reorganized Western Pacific Railroad Company.

The Court: Would it be an embarrassing question to ask who controls the reorganized company?

Mr. Adams: The reorganized company, your Honor, is controlled by its own directors and I will state the facts to you.

The Court: No, I mean as to the stockholders. Do the people that these gentlemen complain about, who controlled the operating company before, still control the reorganized company?

Mr. Adams: No, they do not, your Honor. The control of the reorganized company rests—the James Foundation has the largest single stock interest. The control of the Western Pacific Railroad Company rests in stock ownership with the Reconstruction Finance Corporation formerly represented by Mr. Phleger's office in the reorganization proceedings, by the Metropolitan Life Insurance Company, by the James Foundation, and other stockholders in minor capacity.

Now, the board of directors, your Honor, of this company, seven of the board of directors are Western directors selected by Judge St. Sure in the reorganization proceedings as a part of the plan and selected initially and submitted to Judge St. Sure in the reorganization by the reorganization committee, constituted of Mr. Ecker, the chairman of the board of directors of the Metropolitan, Mr. Wright, the representative of the RFC, and Mr. Coulson, the representative of the James Foundation, those being the three largest stock interests. These seven Western directors, according to the plan, were required to be selected here in San Francisco and every one of them is an independent director.

The Court: Are they now the directors?

Mr. Adams: They are, your Honor. There has

been perhaps one change or so, but there is now on the board a representative of the RFC, a representative of the Metropolitan, two representatives of the James Foundation, and the balance the Western directors, just as when the Court——

The Court: What do you mean by the Western directors?

Mr. Adams: The Western directors, consisting of such gentlemen as Mr. J. Ruben Clark of Salt Lake City, Mr. J. W. Meyer, Jr., Mr. Folger, Mr. Bell——

The Court: Do they represent any particular interests?

Mr. Adams: They do not. They represent the Western Pacific Railroad Company and all its stockholders and they do not, any of them, represent any particular interest except in so far as they may be said to represent the community from which they were selected. There is no question about that, your Honor, and I do not think there is any contention made to the contrary in this case. I do not understand so.

* * *

The Court: I was thinking of the intervener, Mr. Phleger. How far part are you two with respect with what you need to present to establish this ultimate fact that Mr. Phleger speaks of?

Mr. Clark: May it please the Court, you have not been advised that the intervener some two weeks ago stated in writing to the defendant the limitation which we place upon the very broad issue of

duality which your Honor has just described, and the limitation which we intend to follow in the brief. On December 29 I wrote a letter to Mr. Adams and served all parties with a copy of it, in which I made this statement. I will hand a copy of it to your Honor so it may form the basis of a pre-trial order on this issue, if your Honor so desires. I advise Mr. Adams as follows:

“Except for such brief background as may be necessary for a proper understanding of the relative positions of the various individuals and other facts and circumstances as between the railroad company, the holding corporation and James interests, on and subsequent to January 1, 1943, we intend to limit the entire issue of duality, domination and control to the period commencing as of that date, to wit, January 1, 1943,” the reason being, your Honor, that we consider the critical period pertaining to these tax transactions to start on March 15, 1943, so we went back to the first of the year. Now, we have already advised the defendant, then, as to all background beyond that date, except that which is necessary for the purpose of illustration, that we are not going to develop that or rely on it. We are only going to develop the duality and domination which took place during the critical period with respect to these very tax transactions.

Now, we went on and said: “In addition to the duality of various officers, directors and counsel, the railroad company and holding corporation, plus the practical effect and pull under the circumstances

of the James stock ownership and the source of compensation of the corporation officers, general counsel and certain of its directors, as well as its entire office expense after June 1, 1943, we will further contend that during this period the holding corporation was completely dominated and controlled and misused by the James interests through Robert E. Coulson for the advantage of the railroad company and hence James, resulting, among other things, in the tax savings which are in issue here, the said Coulson at the same time being the agent of the railroad company with respect to this very same subject matter. This is the extent of the issue of domination as distinct from duality as we now view it. We do not believe there is any relevancy in whether or not the James interests ever attempted to dominate and control the railroad company or the reorganization trustees, and accordingly we do not intend to raise that issue."

In other words, we have advised Mr. Adams in writing that the only domination that we intend to attempt to prove commences as of January 1, 1943, and is the domination by the James interests per Coulson, trustee and attorney, over the holding company, while Coulson was also at the very same time the agent for the railroad company, the effect of such domination being to advantage the railroad company. I would like to hand this copy of the letter to your Honor.

It is immaterial to us whether this be incorporated in an amendment to our pleading, which is naturally

very broad because it is drawn at a time when we just came into the case and had not developed these facts, or in a pre-trial order limiting the issue, as we suggested in our letter. Now, I take it that that limitation on that issue is entirely consistent with Mr. Phleger's view of it, and with the statement your Honor just made, namely, it is such domination and duality as affected these very transactions of which we complain in this case.

The Court: Why couldn't the issue then be limited to what was done with respect to the preparation and handling of these various tax returns?

Mr. Clark: Plus also, if it please your Honor, the positions held by the parties of stock control——

The Court: You will show, I take it, what actually was done and who handled the matter?

Mr. Clark: Who they were.

The Court: How in general the matter of the filing of these returns was done. Do you have to go beyond that on any general question of duality or control?

Mr. Clark: I do not think we have to except as is necessary to identify these people.

The Court: Obviously it is not the situation or you would not be here, but I was wondering if they might have exercised full powers of control under a duality concept in every other respect than in connection with the tax returns.

Mr. Clark: No, we are concerned solely with these returns, your Honor.

The Court: Your complaint is because these

powers of control were exercised with respect to the tax returns, you have a cause of action?

Mr. Clark: That is right.

* * *

Mr. Clark: There was one further thing with respect to the interveners stock holdings. That is paragraph 2 of this stipulation that sets forth the amount of stock held by the interveners in the plaintiff corporation which qualifies them as interveners in the case. Certain exhibits are referred to which were produced on the New York depositions, and all of these figures have not only been verified by Mr. Adams through looking at the original records, but he uses them in his pre-trial brief, and we would like to have it stipulated to so we would not be put to our proof in bringing the stock certificates out here to prove the stock ownership of our clients.

Mr. Adams: You do not need the stock certificates. As we said last Friday, it will be stipulated that the stock holdings shown at the time of the deposition will be considered to be in force at the time of the trial.

Mr. Clark: That is satisfactory. The plaintiff gives the same statement with regard to that?

Mr. Phleger: We do.

* * *

[Endorsed]: Filed Mar. 11, 1949.

[Title of District Court and Cause.]

ARGUMENT ON MOTION FOR REARGUMENT AND TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW APPEARING IN THE COURT'S OPINION FILED SEPTEMBER 6, 1949, AND ARGUMENT ON MOTION OF PLAINTIFF TO JOIN RECEIVER AS PARTY PLAINTIFF UNDER RULE 25 (e) R.C.P.

REPORTER'S TRANSCRIPT

November 28, 1949

The Clerk: Western Pacific Railroad Corporation vs. Western Pacific Railroad Company.

Mr. Lasky: In that matter, if your Honor please, there are three different matters on the calendar. There are two motions and settlement of findings, I believe. The plaintiff submitted some proposed findings.

I may say that when this was set down for this afternoon last Monday I was a little tangled up and Mr. Phleger was out of the city. I left. I was out of the city last week, and when I finally saw him I discovered he was going to be away this week, but in view of the fact that Mr. Levy was going to be here, we concluded the only thing to do was for me to come out and present the plaintiff's position.

Mr. Levy has a motion here with relation to the findings, which raises one of the two major points which were raised by the plaintiff's proposed find-

ings. Since it is a matter peculiarly within the knowledge of Mr. Levy as to past occurrences in this court before our office came into the case, it seems to us to be appropriate that perhaps Mr. Levy might present his motion first, and then on behalf of the plaintiff I can supplement that discussion. If that meets with your Honor's approval, I am willing to have Mr. Levy go ahead first.

The Court: What motion is it you are speaking of? [2*]

Mr. Lasky: Mr. Levy has a motion; he calls it a motion to amend the findings and for reargument, I believe it is entitled.

Mr. Levy: Yes.

Mr. Lasky: It is not precisely a motion to amend the findings since your Honor has not adopted findings, but it does raise an issue which we have raised on our proposed findings of fact and proposed conclusions of law.

The Court: If you are going to have any argument about findings in this case, I may make my own and just use the opinion. I really do not think there is any occasion for lengthy findings in the case. I put in the opinion that if some counsel have felt there was something that I overlooked or if counsel felt there was some need to make a finding of fact that the court overlooked, I would not deprive counsel of that right, of course.

Mr. Lasky: If your Honor please, we have not

* Page numbering appearing at top of page of original Reporter's Transcript.

proposed lengthy findings of fact. We have submitted, I do not think it is more than four pages, and we adopt your Honor's opinion, or suggest the adoption of it, with a few additions which are material, I think, to the theory upon which the court proceeded; and I think after your Honor has heard the discussion of these objections you will agree that we have not gone out of or disobeyed the intimation of your opinion that we should remain confined to what you thought to be material. [3]

The Court: You think Mr. Levy should present his motion first?

Mr. Lasky: I think he should. I think it might be the most appropriate way to proceed.

The Court: Very well.

Mr. Adams: That is entirely agreeable, your Honor.

Mr. Levy: Our motion, your Honor, is a motion for reargument and a motion to amend the findings and conclusions as embodied in your opinion. We have not submitted any additional findings of fact or conclusions of law. Therefore, so far as we are concerned, we regard that opinion as embodying the findings and conclusions, and the only thing that I propose to raise upon this motion is something which is not mentioned in this court's opinion, is completely overlooked, I believe, and is of extreme importance.

As I read the court's opinion, the nub of the determination rests in your Honor's analysis of the transaction in its origin, finding, as you stated, that the tax savings which were the subject matter of

this controversy between this plaintiff and this defendant were erroneous and unjust, in reality the property of the United States government, and that, therefore, this court did not propose to commit the further iniquity of dividing as between these two parties monies which in fact belonged to a third party, namely, the United States government, and the court concluded that, therefore, the parties [4] would be left where he found them, where they were.

We do not propose to reargue any of the premises that are embodied in that conclusion. We have done a great deal of that, and your Honor has come to his conclusion, and for the purposes of this motion we accept all that your Honor has stated. But in determining where the court found the parties, and in concluding that the court was leaving the parties where it found them, namely, the plaintiff with none of the savings and the defendant with all of them, the court overlooked its own pre-trial order which was entered in just a little more than two years ago and which has gone virtually unnoticed in the course of the proceedings and has only become of importance as a result of the grounds upon which the case has been decided. Therefore, we present on this motion just one question: What is the effect of this court's pre-trial order rendered about two years ago in denying the interveners' application for an injunction restraining the settlement?

Before going into the details of the order and its

effect upon this litigation at its present stage, let me set the stage a little by projecting all of us back to that day in August of 1947 when we brought the motion on.

At that time the plaintiff in its complaint requested what amounted to declaratory relief, and it requested declaratory relief with respect to two distinct aspects of the tax [5] savings, namely, if your Honor will recall this, there were X dollars tax savings involved in the '43 and '44 tax returns. Those tax savings took the form of non-payment of tax, hence the defendant railroad company which had the income had in its possession monies which it did not pay.

In addition, another aspect of the tax savings was the refund claim. That was a claim filed by the plaintiff with respect to taxes in fact paid in 1942, and under the law, the internal revenue code, about which I am sure there can be no dispute, when the refund claim was paid or was to be paid, it would be paid to the taxpayer who filed the refund claim, namely, the plaintiff.

Plaintiff's complaint at that time requested that when and if these tax savings, namely, those in the possession of the defendant, and when, as and if the refund claim was paid over by the government in normal course to this particular plaintiff, that the court adjudge and decree that all of those savings or a reasonable portion of them were the property of the plaintiff.

Since as of those dates, the government had done

nothing, was in fact no seal of approval on the savings.

The intervener in turn had its interveners' complaint. The defendant in turn had an answer in which, with respect to the plaintiff's prayers and claims, it pleaded as defenses to the action, among others, laches, limitations, and the bar [6] of the bankruptcy order, and in addition it contained a counter claim. And in this counter claim the defendants said that this plaintiff has filed a claim for refund for '42 taxes already paid; when, as and if that refund is honored by the United States government, this plaintiff will receive that money, and another thing, the plaintiff may dissipate the money after receiving it; we therefore affirmatively ask for judgment against this plaintiff that when, as and if they receive that refund claim from the United States government, the proceeds belong to us. So that, in reality, you had two lawsuits involving the same cause.

Now along came the settlement or the proposal of settlement, and when we learned of it, your Honor will recall that we came out in great haste with an application for an injunction to enjoin its consummation, and in lieu of submitting the pendente lite restraining order without notice, we submitted it and gave informal notice to all of the parties concerned, and as a result we had a full blown argument on the question of whether or not a pendente lite stay should be granted, which in fact turned into an argument on the whole injunction

problem. Now just what was the settlement? Why did the settlement compel us to come out here and seek an injunction? To begin with, as your Honor may recall, we did not object to the amount for which the claim was being settled; but we did object to the form of the settlement, because the [7] form of settlement, as we viewed it in the light of the litigation, would be prejudicial to this plaintiff's position in this litigation.

Let us analyze that for one moment. The settlement with the government came down to this: so far as the '43 and '44 tax returns, as to which the defendant was in possession of all the money that had been saved by the non-payment of taxes, the government was accepting those returns as filed. Therefore, the defendant remained in possession of those tax savings. The settlement did not alter that part of the status quo. On the other hand, as a part of the same settlement, the claim for refund was waived, so that, so far as this plaintiff was concerned, it was thenceforth, forever and irrevocably denied possession of the funds represented by the refund claim, even though, in the normal course, had the refund claim been honored, the plaintiff would in fact have obtained possession. So that the settlement altered the status quo. [8]

The Court: I don't want to interrupt you, but I think that would have been equally as phony as the settlement that was made with the commissioner.

Mr. Levy: I am accepting your Honor's analysis.

The Court: And for the United States to have returned three million and some odd dollars to the plaintiff who in fact paid it for taxes that should have been paid, would have been even worse.

Mr. Levy: I am agreeing with your Honor 100 per cent on the premises on which you have decided this case, and I want to advert to that subsequently to demonstrate that had that been done, this motion for reargument would beyond peradventure have been granted, and in fact would not have been made. But this much occurred: the settlement altered the status quo to the extent of depriving the plaintiff of possession of any part of the tax savings in issue but gave to the defendant all of the tax savings in issue.

Now focus with me on the question of possession after this settlement was consummated. At that time we were seeking to enjoin it, and our argument was if that settlement is consummated, the entire res in issue in this case is lodged in the possession of the defendant and none of the res in issue in this case would be lodged in the possession of the plaintiff. The form of the settlement altered the normal possessory incidents that attach where you have a tax refund claim and any [9] other type of savings.

We urged to the court at that time that possession in this case was of great importance, and we did it to the limits that counsel could foresee what the future might bring. And we argued thusly: We said that the defendants have affirmative defenses, laches, limitations, the bar of the bankruptcy order.

All of those defenses are appropriate only where plaintiff has to sue the defendant to get any part of what it thinks it is entitled to. On the other hand, to the extent that the plaintiff may have possession of anything which the defendant thinks it is entitled to, to wit: the subject matter of the counter claim, then for the defendant to prevail against the plaintiff it cannot rely upon laches, it cannot rely upon limitations; it must affirmatively sustain the burden that it is indeed entitled to the proceeds which the plaintiff has in its possession. So that we said that possession, therefore, became a matter of the utmost importance in view of the state of the pleadings.

I argued that as vigorously as I knew how to, your Honor, and in the course of giving vent to what I guess was my womanly intuition that no lawyer in any litigation can foresee all of the eventualities, but knowing that never let your adversary get possession of something which you in the normal course would be entitled to have possession of, I argued that there were possibly further prejudicial incidents that would [10] flow from the form of this settlement. I argued that it is conceivable that this court might conclude, on a basis which I stated there and which has no resemblance to the conclusion of the court—it was possible that this court might conclude that it ought to leave the parties where it finds them in and I said, “If that is true, why then should we allow the mere form of settlement to alter the normal possessory incidents that

would attach to this transaction were the settlement made in a more usual form.” And as a result of that, I said, “I think the way to cut the Gordian knot is to let the settlement with the government go through in the form in which it was proposed, but that vis-a-vis, the two parties to this lawsuit, because giving the plaintiff possession of a reduced portion of the refund claim just as if the United States government had in fact settled that claim for a reduced amount and in fact paid it to the plaintiff, and when the same suggestion was made that maybe the funds would be dissipated, I said, “Well, fine; pay it to us and we will promptly pay it to the clerk and it will stay in the court.”

Now, your Honor, in response to that argument, as I understood it, took the position that interveners were indeed too concerned with formalism, if I may put it that way; we were too worried that the form of settlement might conceivably produce prejudicial results in the litigation. And your Honor properly stated that, as a court of equity, you would have the [11] power to ignore the form of the settlement, view the transaction as if the settlement had taken a normal course, as if plaintiff had possession——

The Court: Where are you getting this from? Some transcript of record?

Mr. Levy: Yes.

The Court: I thought that the parties had agreed pretty much on the form of the order that was made at the time.

Mr. Levy: On the ultimate form of the order, but not on the substance of the debate. I will come to that.

Let me pass that for the moment.

Your Honor reiterated that point of view, though, and then finally came to this conclusion: as far as you were concerned, you wanted to deny the injunction motion conditioned upon the execution of a certain stipulation which the court approved and the defendants were willing to enter into and which we said was insufficient.

The Court: Mr. Levy, I don't want to interrupt you. At that time you were arguing some preliminary motion in the case. I didn't know very much about the case then except that you were engaged in a question of discussing whether the status quo should be maintained or not, and I may have made some comments in connection with that matter that haven't any relationship to the final questions to be determined at the trial of this case.

Mr. Levy: No. I may have overly embellished what went on at that time, but only for the purpose of refreshing all of us. It is two years. We are not relying on the off the bench comments that the court made. That is not the basis of this reargument motion. What we are relying upon is the order that we made on this motion, and perhaps a short cut to all of this is to read the relevant portions of the order. Now here they are.

“It is hereby ordered:

(1) That the application of interveners for a

restraining order be and the same is hereby denied upon the condition that the defendants shall enter into a stipulation with the plaintiff in the form annexed hereto marked exhibit A; and upon the further condition that said hearing upon said application of interveners shall be deemed a pre-trial hearing on the aforesaid issues as if properly noticed as such so that the court may make and enter an appropriate pre-trial order pursuant thereto; and

(2) That the aforesaid settlement with the United States government shall have force and effect in this action and as between the parties hereto solely to the extent that it reduces pro tanto the total amount in controversy herein and that in all other respects this court shall and does hereby preserve [13] the respective rights and positions of all parties and shall determine the issues and give judgment herein, in the same manner as if said tax saving had been allowed and said refund claim allowed and paid by the United States government in the ordinary course and manner prescribed by law and as proportionately reduced by said settlement.”

Now what is the effect of that pre-trial order? As I read it, it states that, for all purposes of this litigation, the position of this plaintiff shall be that of the possessor of the reduced refund claim proceeds just as if the United States government in the normal course had paid it to the plaintiff.

The Court: If you were entitled to it.

Mr. Levy: I am talking now of possession, your Honor; I am not talking about who ultimately may have title to it.

The Court: I don't see the relevancy of that. That was merely some order that was made so that if there were a result that would be favorable to the plaintiff, it would not be thwarted by the plaintiff being unable to realize upon it, so in order to put the parties in a position where if you did obtain a recovery you could not be defeated in that because of the fact that you lacked some possessory or other right in the matter, you entered into this stipulation.

Mr. Levy: Exactly. [14]

The Court: That presupposes. If it is determined that you are not entitled to it, what difference does that stipulation make?

Mr. Levy: Your Honor, as I read your opinion, has decided not that we are not entitled to it, not that the defendant is not entitled to it, but rather that the United States government is entitled to it, and as between these two litigants you are going to leave them where you find them.

The Court: That is not true. I think I also placed the decision on the ground that I couldn't see any reason why the plaintiff would be entitled to it anyhow.

Mr. Levy: That brings us to another point at which we quarrel.

Let us assume for the moment that your Honor did decide that you are going to leave the parties where you find them because this transaction was

so contaminated in origin that, as far as you were concerned, equity would not aid either party, or, as you put it, you would not commit further inequity by distributing it among these parties when in fact it belongs to the United States.

Now, as clearly as language could say it, in my humble judgment, the court said just that in its opinion. And just as clearly, it seems to me, that when a court of equity states that for grave and sufficient reasons the litigation, or the origin of the pot in controversy, it is so contaminated that [15] equity won't touch it but it will leave the parties where it finds them, that is a conclusive determination of the case, and it excludes as completely irrelevant any other considerations about who would in fact be entitled to this pot if the court felt that it could go and look at the equities as between the two parties.

Your Honor will probably recall from away back in law school days in the famous Hornbook cases of the old highwayman when thieves would fall out as to the devision of the loot and one thief would have the temerity to come to a court of equity and sue his partner in crime for a division of the swag other than that which had already occurred, and the court of equity said, "A plague on both your houses. A court of equity will not lend itself to the distribution of what originates in crime."

Now I know that isn't quite this case, but the conclusion in this case is an extension of it, and that is exactly what you held here. And I say that, having held that, then it becomes important to de-

termine where did you find the parties. And in determining where you found the parties no reference was made to this pre-trial order, and it is this pre-trial order which tells us where the parties were found on the day they walked into this court house to try this litigation. And if it doesn't do that, then it is hardly worth the paper it is written on. [16]

The Court: Well, I again have to say to you all that depends upon whether you are entitled to get it, and that is all, and I held adversely to you on that. I don't see how you can be helped by the pre-trial order, Mr. Levy. I have listened to what you have had to say about two years ago, but the ultimate result was that the court held that you were not entitled to it. If you are not entitled to it, then the fact that there was a pre-trial order that held that which you were quarreling about in a certain form does not help any, because that was not intended to be a determination of whether you were entitled to get it at all. I don't see how it can be converted into that as a result of any of the reasoning on which the court's decision was based.

Mr. Levy: Let me try to test that with the hypothetical. Let us assume that this plaintiff did indeed get the proceedings of the refund claim from the United States government. And your Honor's observations about how utterly preposterous any such thing would be would be just an appropriate had we received the refund claim as the settlement. Now the plaintiff has the proceeds of the refund

claim and the plaintiff is perfectly content to keep them as its share of the tax savings. Let us hypothesize that.

The Court: Even if the defendants agreed that you were to have them, it would not be up to the court to interfere with that agreement? [17]

Mr. Levy: That is just the point.

The Court: That is a different situation.

Mr. Levy: What happened next in my hypothetical is that the defendants did not recognize that plaintiff is entitled to keep them.

The Court: Then the plaintiff is only a stakeholder and he doesn't get any greater rights because he is made a stakeholder.

Mr. Levy: I am afraid, your Honor, you are not giving me an opportunity to pose my hypothetical.

The Court: Go ahead.

Mr. Levy: I want to come to grips with what I think is the fundamental issue.

Plaintiff says, "I am willing to keep that money; it is mine. I don't care; you can keep what you have." But the railroad company says, "Why, I should say not; you are not entitled to the proceeds of the refund claim." And then instead of what is now the plaintiff corporation suing the railroad company, the railroad company comes into this very court and sues the plaintiff corporation to get back the proceeds of that refund claim. That could just possibly have been the way in which this lawsuit was posed to your Honor. Indeed, so far as the pleadings were concerned, the counterclaim of the

defendant was just that: they wanted to get back the proceeds of the refund claim. Having come in before the court with Mr. Adams representing the plaintiff railroad company in its suit to get back the proceeds of the refund claim, the same debate occurs and the same trial is gone through, and the same evidence is presented to the court and the court writes the same opinion, only this time what the court says is this: "The whole payment by the United States government is eliminated for reasons A, B, C, D, E and F. I therefore will not commit the further inequity of distributing to this railroad company what this corporation has; it really belongs to the United States government; I am going to leave the parties where I find them." Where would you leave the parties then? You would have left this railroad company with \$10,000,000 and you would have left this corporation with \$4,000,000, and that would have been your decision.

Now, to my mind, that is exactly what you have before you in this case; no difference. The mere fact that the corporation is the plaintiff asking to get back from the defendant what the defendant has, and the defendant is counter claiming to get back from the plaintiff what the plaintiff has does not disturb the essential clarity of the hypothetical that I gave you. In each case the parties are coming to the court saying, "Give us a judgment that we are entitled to—a distribution." In each case the court is just as appropriately saying, based on your Honor's reasoning, that you must leave the parties

where you find them. So that it becomes crucial to find out where the parties were left, where you found them. That is the importance of the pre-trial order, because when I argued to this court on our injunction motion that the way to cut this Gordian knot is to place this money, physically transfer X dollars and to put them in the clerk's custody, your Honor's response to that was, by your pre-trial order, "You will have all of the incidents that attach and you will indeed be in the same position as having in your pocket or in the clerk's pocket the reduced proceeds of that refund claim."

Now if that is what the order says—and I submit that language could hardly be chosen which would say it more clearly—then your Honor, by concluding that the parties must be left where you find them, should give effect to the pre-trial order and say that you find this plaintiff in possession of X dollars.

Now let me come to the next problem. Let us take the highwayman case, just to make more graphic what we really have involved here. Supposing the highwayman's case when one thief sues another for distribution of the proceeds, the plaintiff thief comes into court and says, "Here is the contract that I have with my co-thief in which for good consideration complying with all the perquisites of the law of contracts, he has promised to give me 50 per cent of whatever swag we steal." There isn't any doubt in your Honor's mind [20] that you have a good contract there, you are entitled to recover. But the court says, "Oh, hold on; I am not

concerned with whether your contract is good, bad or indifferent. You are in no better position in this court than if you did not have a contract and you came into this court of equity asking for a fair distribution of the swag, because, as far as I am concerned I stop my inquiry short of analysis of the equities between the parties or their legal rights or equitable rights and I stop it short because this court of equity will not assist either of you in achieving relief against the other. I will leave you where I find you, and if you are unfortunate enough to be left with nothing and he is left with all, even though you have got a good contract otherwise, that is too bad; you don't get a decision; I am going to leave you where I find you." But alternatively you do have a situation there which is mutually exclusive, your Honor. A court of equity that goes to leave the parties where it finds them would be extremely careful that it would not in the same breath turn around and give judgment to the defendants to recover any part of the same swag of the plaintiff. The court is going to truly leave the parties where it finds them.

And that, I say, is the situation we have here. We have only, to my mind, one issue on this motion; that is, does the pre-trial order leave this plaintiff in the same position as if it had physical custody, possession, the right to [21] possession of the proceeds of the refund claim as reduced. It is utterly immaterial what the court would do were it disposed or empowered or authorized to look into the relative equities as between the parties.

The Court: But the refund claim, though, was abandoned.

Mr. Levy: Exactly. The refund claim was abandoned under [21A] the form of settlement as submitted, and we said that was prejudicial; that the settlement should have been so formed, or if that were not possible, that, by agreement of the parties, plaintiff should be given possession of the pro tanto reduction of the refund claim.

To put it more concretely, what you really had at issue was twenty-one million worth of taxes from the government. The settlement took the form of approving the two tax returns that were filed adding up to \$17,000,000 savings and rejecting the refund claim for the \$4,000,000. So, in fact, you had the settlement of \$21,000,000 savings by the payment of \$4,000,000 worth of taxes. Now the form that it took was that the claim for refund was waived.

The Court: Wasn't that exactly what you have done in the form in which it was handled? The net picture was that the defendant was liable to pay \$21,000,000 in taxes and it was satisfied to escape the payment of \$17,000,000. That was the net result.

Mr. Levy: Exactly. The purpose of our injunction——

The Court: The claim for refund may have been something else; it could have been some other item that was taken into account in determining the amount of the tax liability or non-tax liability of

the defendant. It was merely material that was there that was availed of and made use of in determining the extent to which the defendant did not pay these taxes. [22]

Mr. Levy: Exactly. That would be true if there weren't this litigation and if there weren't claims and cross-claims between this plaintiff and defendant.

The Court: I don't think the United States government paid any attention to that—at least I hope not—when it made the settlement of this matter.

Mr. Levy: None whatsoever, but we paid attention to it, since we were representing the plaintiff here, and our point was that since in normal course any refund coming would be paid to the plaintiff, and plaintiff would have possession of it subject to your Honor's determination; and in that normal course if the tax returns for '43 and '44 were approved they would have possession of those savings subject to your Honor's judgment. Our argument was in view of the pleadings and the defenses and the possible arguments, the settlement should not alter the position, the status quo of the parties. That was the argument we made. We were not asking your Honor to prejudge the case and we argued that we were entitled to keep the refund.

The Court: Suppose, Mr. Levy, there wasn't any tax paid, there was no refund made, the total amount of taxes due the United States was twenty-one million and it was settled by the taxpayer pay-

ing four million and not having to pay \$17,000,000. Would that have been any different than what was done? [23]

Mr. Levy: It would as far as the rights of these parties are concerned on the basis upon which the court has decided it.

The Court: Wouldn't the tax liability and tax savings have been the same?

Mr. Levy: So far as the United States government is concerned, it is just the same. Let me again revert back to the hypothesis of the highwayman. Suppose the man from whom they stole the money, all he knows was that his money was stolen, but as between one thief suing the other thief——

The Court: I don't think you should emphasize that——

Mr. Levy: I am making the argument because that is the origin of the whole doctrine. I don't think any of us needs to have a guilty conscience. I make the hypothetical because it emphasizes the nature of the problem. That is the way this problem comes into court for judicial determination more often than not.

To get back to the hypothetical, as far as the person from whom the swag came, of course it is immaterial what the pot is, it has all been taken away from him, and wrongfully, too. But when one of the co-venturers in this illegal venture sues the other co-venturer and the court decides, "I am going to leave the parties where I find them," then

it becomes important indeed to see who is sitting with what.

I am not appealing to the court to resolve who is entitled to what, and it indeed does not resolve who is entitled to what. It says, "I don't care who is entitled to what; I will not let a court of equity be used to further the rights of either party; I will leave them where I find them."

And to our mind the pre-trial order is what leaves us where this court should find us as of the date of this trial and as of the date of the decision.

The Court: That is the basis of your motion for reargument to amend the findings of fact?

Mr. Levy: That is indeed, your Honor.

The Court: There is another motion, is there?

Mr. Lasky: There is another motion which I would like to urge later because it has nothing to do with this subject matter. The plaintiff has submitted some proposed findings of fact. Finding No. 1 adopts the court's opinion and it is supplemented by six or seven specific findings and to make them specific, and raises the same issue which counsel has just discussed. I would like to supplement that since it is the subject matter you have been hearing about.

The claim for refund, if the court please, was not abandoned. What happened under the settlement was that the government rejected it. If a refund had been paid, it would have come to the plaintiff subject to your further orders as a court of equity as to what should happen to it.

Plaintiff declined to permit the defendants' counsel to consent to the rejection unless a stipulation was entered into. That stipulation which was filed in this court states in so [25] many terms that it must be deemed that the refund so allowed was paid to plaintiff as the agent for the affiliated group, and by the plaintiff paid into court.

After that stipulation was worked out which provides that it must be deemed a refund which had been paid to my client, Mr. Levy came in and objected that even that might not be clear enough, and on the basis of it he obtained your Honor's pre-trial order which provides in so many words that the case shall be decided "as if said refund claim had been allowed and paid by the United States Government in the ordinary course and manner prescribed by law."

That meant to the plaintiff, and in our proposed finding No. 7 we request the court to make a finding as to that, that that stipulation was entered into, adopting it by reference, and that the court order, the pre-trial order, should be entered.

Now whether or not the court believes that from those facts follow the conclusion for which Mr. Levy has argued, and in which we concur with Mr. Levy, I think it is pertinent to your Honor's theory and the facts should be succinctly found in the findings so that they can be presented to the Appellate Court.

I think Mr. Levy is correct when he is apprehensive, for this reason: Your Honor's basic reason-

ing—you may not have put it in your opinion, but at least the basic theory was that [26] here were parties taking part in something that was improper, the money did not belong to either, therefore a court of equity would not intervene.

Hence, if the \$3,400,000 must be treated for the purpose of this case as if it had been paid to the plaintiff, then, under your Honor's theory, it seems to me that the court would have to leave it also where it found it. Our proposed conclusion upon this amendment reads as follows:

“By virtue of the stipulation filed herein on September 5, 1947, and this court's order of August 29, 1947, the sum of \$3,385,000 must be deemed to have been refunded to plaintiff by the Treasury Department in the ordinary course and manner prescribed by law and by the plaintiff paid into this court.”

I may interrupt to say that that seems to follow inevitably from the stipulation and court order.

“Said sum is now held by defendant as agent of the court. Defendant should be directed to return said sum of \$3,385,000 to the clerk of this court, and the clerk should be directed to deliver said sum forthwith to the plaintiff in accordance with this court's opinion that the funds or tax savings resulting from the settlement with the government should be left with the party receiving the same; [27] and the court further concludes that defendant should not be required to account to plaintiff for any tax savings not represented by refunds.”

If the court please, it seems to me, and I respectfully submit, that that must be the conclusion that follows from the reasoning of the court's opinion, analyzing and following it through. If the money had actually been paid to the plaintiff, as it must be deemed that the refund was, would your Honor, under your opinion, now order the plaintiff, under the defendants' counter claim, to turn that \$3,300,-000 over to the defendant because in equity the defendant was entitled to receive it? Of course your Honor could, if that is the basis of your determination, make such a judgment, but on the basis of your opinion that you would not intervene, it seems to me that that cannot be the basis of the judgment.

The Court: I think I might say there that the basis of the court's saying that it would not intervene was a little bit broader and was based upon broader grounds than the mere technical situation, I suppose, that might have been created by the pre-trial order in the case. It is that, under the circumstances under which this whole tax situation developed and the results of it, as against that background the broad view that the court took was that the parties would be left where they were.

I don't think that the argument that you make in that [28] regard has changed the situation, because what you were trying to accomplish by this pre-trial order, as I recall it, and as I understand from statements that have been made, was to protect the plaintiff against any argument that might be

later made that the plaintiff did not have the right of possession of this. In other words, I did not make the decision as to leaving the parties where they were rest upon the mere possessory rights to this money or these tax returns as they may have been created by the parties, but against the background of the actual situation created by the so-called tax savings refund by the government. Perhaps I am not expressing myself clearly.

Mr. Lasky: I understand what the court is saying. I want to make two suggestions in response to it.

No. 1. The settlement with the government was not entered into with the formality required to be binding upon either side, which would have required approval of the Secretary of the Treasury. It became binding only because the government neither levied a deficiency assessment, nor did the plaintiff, in whose name suit for a refund would have to be filed, file another suit.

The statute of limitations on a suit brought by my client against the government did not run out until ten days before this court's opinion in this case. If the court had declined to approve that pre-trial stipulation under the pre-trial order [29] and had the court entered its opinion earlier than it did, the plaintiff could still have filed a suit against the government, and if it had prevailed on the tax claims the refund of \$3,300,000 would come to the plaintiff, not to the defendant; it would take the affirmative decision of this court or a court to make the plaintiff turn it over to the defendant.

However, if your Honor feels that the theory upon which you entered your opinion does not lead to the conclusion for which we contend, still there are the facts which we seek to have you find on, namely that the pre-trial stipulation was entered into and that your Honor entered your order on the basis of it. Those are facts which are material to the theory we propose to present to the Appellate Court.

The Court: I think you could have written this up, Mr. Lasky, without my making any finding in connection with it. As a matter of fact, I don't see how I could do that, because I am taking into consideration the pre-trial order in rendering the decision in the case. If you contend that that pre-trial order would have that effect, I think you should bring that up as part of the record, but I don't see what good it would do for me to make a finding that there was a pre-trial order made which I did not take into account. What advantage would that be to you?

Mr. Lasky: It will be a convenient and handy way to [30] present it to the Appellate Court. May I say that the plaintiff's finances are so restricted that it has got to think of the most convenient way of getting the record before the Appellate Court.

The Court: Well, the pre-trial order isn't very long. Can't you include that in your record?

Mr. Lasky: I suppose we could.

The Court: If you need any order from me to include it in the record, I will make the order.

No. 12506

United States
Court of Appeals
for the Ninth Circuit.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I.
duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO
NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY,
DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY
COMPANY, THE STANDARD REALTY AND DEVELOPMENT
COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE
& CO., INC.,

Appellants,

vs.

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DEEP CREEK RAILROAD COMPANY, THE WESTERN
REALTY COMPANY, THE STANDARD REALTY AND DE-
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Transcript of Record
In Five Volumes
Volume II
(Pages 445 to 910)

Appeals from the United States District Court,
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FILED

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Mr. Adams: No order is required for that purpose.

The Court: You are entitled to have anything you want to rely on in the record. That stipulation is an exhibit in the case, isn't it?

Mr. Adams: Yes, it was an exhibit.

Mr. Clark: The pre-trial order is.

Mr. Adams: The pre-trial order is an exhibit, there will be no question about it.

The Court: If there is any question, that pre-trial order can go in as part of the record.

Mr. Lasky: That may serve our purpose as far as proposed finding 7.

The Court: If there should be any question about it, I will order it included in the record.

Mr. Levy: If the court please, I had some other proposed findings. There were only five or six of them. [31]

Mr. Adams: Do I understand that this matter is disposed of, your Honor? I would suggest that we stay with this one subject.

Mr. Levy: That was what I was about to ask the court, whether the court wished to proceed with the other motions before the court or wait.

The Court: As Mr. Levy has come a long way to present this matter, I don't want to take sort of snap judgment on it, but I feel, in my opinion, that that does not affect the basic grounds upon which the opinion is based. Anything that you want in the record so that you can properly present that up above, the court will make such an order as

will enable you to bring up any of these records that you wish.

Mr. Levy: I have in mind, if your Honor would permit me, I would like to make a few further comments with respect to our different lines of thought unless you think that no point will be served by it.

Mr. Lasky: I will defer my other matters until this has been disposed of.

The Court: I don't want to shut you off. Is there anything else that plaintiff wishes to present?

Mr. Levy: Just this one observation: Your Honor seems to think that the pre-trial order had importance only insofar as it might reflect upon some procedural disabilities that might occur in the course of the litigation. I think you so [32] expressed yourself just a moment ago.

I don't see any difference—let me withdraw that and state this: I think that in so narrowing the effect of that pre-trial order, you set a premium and in effect penalize counsel who urged the necessity for an injunction at the time that they did so, because, believe me, had I had the foresight and mental powers and perspicacity to anticipate specifically what your Honor decided in this case, I would have stated to the court that “one of the reasons why I want this corporation to have physical possession of the reduced amount of the refund proceeds is because this court may conclude that the transaction with the government was such that it would leave the parties where it finds them.”

And had I had any such notion in mind, I would have so stated to the court.

Now in lieu of that, this is what I did state to the court—and I quite frankly say lacking the brain to anticipate what the course of the long litigation could produce where possession would become an all-important factor—and this is what developed; I am reading from the transcript of that argument.

“The Court:” —let me jump that and come to this. I may paraphrase. You, that is, the court, say:

“How can we the plaintiff be damaged otherwise by the form of this settlement?”

And I went on to state how. [33]

“Let me pursue that a moment. Assuming each party had in its possession what it would normally possess if the government had approved of the tax returns and paid the refunds, and assuming that this court evolved this theory of law, and it is not unusual, that the parties had no agreement as to how the tax savings should be shared. The railroad company possesses then ten million one. The parties have no agreement as to how the refund shall be shared. That has been paid to the corporation by the government. Now, equity, in view of the fact that the parties had made no agreement, equity says, ‘We will leave the parties where we find them.’ That is a possible conclusion of this court that I am hypothesizing, and if that were the conclusion of the court then the railroad company

would be left with \$10,100,000 and the corporation would be left with the \$4,200,000. This settlement makes that conclusion impossible because only the railroad company has the \$10,100,000. We do not have the \$4,200,000, so that to our mind is a hazard."

That is the way in which we were thinking when that request for an injunction and the pre-trial order were submitted. We could not be expected to anticipate every respect in which possession might become of crucial importance in the determination of a long lawsuit, but our intuition was sound, and that [34] is, that we ought to have possession of what in the normal ordinary course we would have possession of but for the mechanics of the settlement adopted by the defendant and its representative vis-a-vis, the United States government.

The Court: How would you get the possession without some judgment or order?

Mr. Levy: Very simply.

The Court: How could you get possession of the \$3,000,000?

Mr. Levy: You mean right today?

The Court: No, no, at the time this happened, how were you going to get possession?

Mr. Levy: Your Honor answered that before. The United States government was not concerned with any internal squabble between the parties, a consolidated family, substantially.

The Court: You were coming in asking this court to issue an injunction, weren't you?

Mr. Levy: Certainly, to restrain settlement.

The Court: And this pre-trial order was made in lieu as a settlement of the application for injunction.

Mr. Levy: Exactly.

The Court: Now, it, the railroad company, was not admitting that you were going to get this three million some odd dollars——

Mr. Levy: From the U. S. Government?

The Court: Yes. [35]

Mr. Levy: The defendant railroad company itself cannot deny that were the government to pay the refund claim or to settle it separately, the plaintiff in this case would have had possession. Of that there is no dispute.

The Court: If you could have got it, but I don't suppose the defendants' representatives would have stood by and let you collect that.

Mr. Levy: Exactly. That is why we resorted to this court and that is exactly why we say——

The Court: It was a fight over who was going to get it. It would have taken some sort of judgment to determine that. You couldn't by some act of your own have determined that matter in pre-trial.

Mr. Lasky: The government would only recognize the plaintiff upon the settlement.

Mr. Levy: We are not talking about the same thing. Let me go back one step. The regulations and the statute provide——

The Court: I understand that; the refund goes to the man that pays it.

Mr. Levy: Oh, no, that is in error.

The Court: The refund goes to the taxpayer.

Mr. Levy: That is it exactly, which is the parent corporation in our family. I am not saying that by the government's act of paying to the parent, ergo, ipse dixit, the [36] parent has title. I am not saying that. What I am saying is that there can be no dispute that the refund claim in normal course would have been paid to this plaintiff. This plaintiff would have had possession with a cloud and the cloud would have been resolved only by this lawsuit. And I say that this court, had it resolved the cloud and said, as a matter of the fundamental rights of the parties here, the defendant is entitled to a judgment, this pre-trial order would have become academic and just as the pre-trial order would have become academic if the court had decided there is nothing to the defense of laches or limitations. But the court did not say that. What the court said was that "we will not inquire into the matters; we will leave the parties where we find them because the transaction in origin was contaminated." Therefore, possession is not academic. This is one of the few instances where a lawsuit winds up with nothing being more important than who has possession rather than who has title.

The Court: Personally I think that was a lot of anxiety and effort over nothing, because, whether you entered into a stipulation or not, if this court decided that the plaintiff was entitled to all this money, there would have been a judgment against

the defendants for that amount of money and they would have had to pay it. So it doesn't loom very large in my mind what the effect of this pre-trial order and stipulation is. What difference does it make? If as a result of [37] this litigation it was found that this money should have belonged to plaintiff, there would have been a judgment against the defendants to pay that amount of money.

Mr. Levy: May I pose a question to your Honor? I am trying to throw some light on this problem; I am not looking for a fight, so to speak, just a point of great interest and great importance in this lawsuit. Let me say nobody need have any guilty feeling about this——

The Court: You weren't worried about that, that if you won this case you wouldn't have gotten judgment for the amount of the taxes?

Mr. Levy: No, but what I was worried about was that possession might be the determinative factor.

The Court: That brings me back to what I said in the very beginning. The only point of that was that if it was determined on the merits that you were entitled to this money, that you would not have been up against some technical obstacle that you were not entitled to get it nevertheless because you did not have possession.

Mr. Levy: Not at all. It is just as appropriate that what we were worried about was that a court should stop short of inquiring into the merits and merely rule on something which makes possession all important, which is what you have done.

Let me ask one more question. [38]

The Court: All right.

Mr. Levy: Let me pose this question to you: Take my case of the thieves having fallen out and one suing another, and take my case where, not that they did not have any agreement but they indeed had a contract between them,—a unique kind of thief—and under the contract the plaintiff came into court merely stating a cause of action for breach of contract, the contract being annexed, and in addition saying, “The defendant has the proceeds; we are entitled to 50 per cent by reason of the contract.” That is his cause of action. The defendant comes in and espouses any number of defenses. Then the case goes to trial, and your Honor, before you have heard more than one witness on the stand—the gentleman testifies that the way in which the fruits of this venture came about is, “I, Jones, the witness, held up Pete Smith,” I could visualize where in that instant the court would say, “I have heard enough,” and decide the case at that point without knowing who had what right to the proceeds or what right to the title and decide the case and say, “I leave the parties where I find them.” That makes only one thing important to the litigants, and that is, where do you find them? Where do they find each other? Possession may not be important to the court; title is of no importance to the court, but so far as the judgment is concerned and these two parties, it is all-important to know who sits holding what. [39]

The Court: Mr. Levy, you are really making a motion for a new trial in this matter, and I hope I am not going to have to hear it all over again.

Mr. Levy: No.

The Court: I don't see how it possibly arises in connection with findings, because as part of the record you could bring it up to the Appellate Court and make your argument there.

Mr. Levy: That is why we moved to reargue and to amend the findings of fact. That was our reason. We felt that it would require an amendment of only the last line, but it happens to be the all-important one.

The Court: Well, for the sake of the record, I will deny your motion, Mr. Levy, and on your record I will protect you on your right to bring up these matters in connection with the settlement, with the making of the pre-trial order so that you may have those matters before the court on which you base your appeal.

Mr. Lasky: Shall I proceed with the other matters?

The Court: Yes.

Mr. Lasky: There are two other matters, and one of them I would say is a formal matter and ought to be non-controversial. Whether it is going to be objected to, I am not sure.

It is a motion to bring in the receiver as a party plaintiff. On October 19 of this year the Chancery Court of [40] the State of Delaware appointed Mr. Alexis DuPont Bayard as receiver of the plaintiff corporation.

Under section 68 of the Delaware Corporation Law, a court of chancery may revoke a charter for anyone of a number of causes, and under the general equitable law, your Honor, a court may take jurisdiction of a corporation where its primary corporate duties fail and may make such necessary adjudication as it deems proper.

In view of the outcome of the Western Pacific reorganization and the outcome of the Denver & Rio Grande reorganization, nothing remained for the plaintiff corporation to do but to collect such assets as it had and distribute them to its stockholders. So the Attorney General of the State of Delaware filed a bill in equity in October, and on October 19 a receiver was appointed and was directed to take charge of the corporation's assets, and the order, which is part of the moving papers here, particularly specifies that he shall enter his appearance in this suit and prosecute it and select attorneys to represent the receiver, and he authorized us as attorneys for the plaintiff to appear in his behalf.

Rule 25(c) of the Rules of Civil Procedure provides, as your Honor knows, that——

“in case of any transfer of any interest, the action may be continued by or against the original party, unless the court upon motion directs the person [41] to whom the interest is transferred to be substituted in the action or joined with the original party.”

In other words, it seemed to us that we were in duty bound to advise the court before judgment

was entered, that the receiver had now taken over plaintiff's assets and to apply to this court, in its discretion, to either substitute the receiver or join the receiver as a party plaintiff. And it seems to us the record ought to fully disclose the real relationships of the parties in interest in this case. So what we have asked the court to do upon this motion is to make an order that Mr. Bayard as receiver shall be joined as a party plaintiff for all further purposes of the case. It seems to me to be a perfectly formal matter to get the right parties before the court.

Mr. Clark: The intervener has no objection to that motion.

The Court: Have you any objection to that?

Mr. Adams: Yes, I have, your Honor. I will state it very briefly. Rule 25(c) is a rule under which it is discretionary for the court to permit the joinder of a new party as transferee of the interest of a party. The rule follows state court practice, particularly that of New York and California. The rule is that the court is not required to take in the new party upon its application. It is entirely proper, in other words, under the practice and the rule for that litigation to go forward in the names of the parties to the litigation when [42] the fact, as in this case, is that the new party stands in the shoes of the original plaintiff, it doesn't seek to appear as a party having any different or individual interest different from that of the corporation itself, the plaintiff. Now, as I say, it is entirely dis-

cretionary with the court whether it shall make any order; but when the new party seeking to come in does not have a position in the litigation different from that of the transferor party, then the ordinary, and I think the best, practice, is for the court to order a substitution, if it is going to make any change, of the transferee in place of the transferor as a party. That has not been applied for here. This application is an application for the receiver to be an additional party. And we already have, as your Honor well knows, two spokesmen on the other side for the corporation's interests, and this is an effort to get a third.

Now we are somewhat apprehensive that while the receiver now appears through the corporation's own counsel, and thus indicates for the time being that his interest is the same as that of the corporation, that the fact may develop that for some reason he may take still an independent position. We don't know that.

Now may I say this: While it is entirely in the discretion of the court to act one way or the other where there is a transfer of interest, it is not clear upon the record [43] presented to your Honor with respect to the appointment of this receiver that this receiver is in fact the transferee of the corporation's interest.

It is a remarkable set of papers. When you take the set of papers and try to tally them with the Delaware law, you will find that the application for receiver refers to section 68 of the Delaware Cor-

poration Law as one of the grounds. That statute provides that upon the dissolution of a corporation a receiver may be appointed, but this set of papers shows that this plaintiff corporation has not yet been dissolved.

The application is also grounded upon the general equity practice of Delaware courts, and I wouldn't pretend to be familiar with the equity practice of the Delaware courts, but I do notice that the order of appointment of the receiver recites as its foundation that either the case is one for the appointment of a receiver under section 68, or, in the alternative, under the equity practice, so that your Honor cannot tell from these papers which it is.

It is the Delaware law that a receiver appointed *pendente lite* does not take title to the corporation's assets, and it would only be in case this receiver were one appointed under section 68 after dissolution of the plaintiff corporation, as I apprehend it, that this receiver would have title.

Now that is about all I want to say about this, except to [44] suggest to your Honor that, in view of the character of the papers presented at this time and in view of the immediate status of the litigation and the doubt as to whether this receiver is a proper party, perhaps the best thing to do would be to deny this application without prejudice, because there can be no possible prejudice from the denial, and wait until time develops that this receiver can show in fact that he is what section 25(c) requires, namely, the transferee of the interest of the corporation.

And I would like to say just one further word: that it will appear from the record upon the application that this receivership proceeding taken in Delaware was taken with the consent of plaintiff corporation; the receivership proceeding, in other words, was a friendly proceeding. I am not suggesting that there is any impropriety in a friendly proceeding, quite the contrary; but it is a significant fact that right intermediate between your Honor's decision of his case and the motions now before your Honor we are met with an application of this character and, as I see it, a somewhat dubious situation as to the title of the receiver.

Does your Honor wish to hear from me with regard to plaintiff's proposed findings?

The Court: Mr. Lasky has not presented those yet.

Mr. Lasky: With respect to this matter, if the court please, it seems to me that the position is somewhat captious. [45] Counsel criticizes and raises questions whether under the Delaware law a receiver should be appointed at this time or take title; but after all, the court must give due faith and credit to an order of the Delaware court, and the order of the Delaware court is quite specific. It commands the receiver to take over all the assets and to prosecute this suit. He is appointed and he has qualified. He now has command of the litigation, and whether he becomes a party of record or not, he is the real party in interest. If the court denied the motion he would be operating under the

name of the plaintiff. It seems to me that the records of the case ought clearly to show who is prosecuting it.

The danger that the receiver will take one position on appeal and the company plaintiff take another position has no merit because whatever position the receiver takes, there is nothing the plaintiff can do about it. The plaintiff has no funds that have not passed into the possession of the receiver.

Our experience has always been that when there has been a substitution or transfer of interest, that ought to be noted of record.

We had a rather sad experience some time ago in a case that was tried in this court, I think it was Bliss vs. Lowery.(?). We had a long battle and very parlous moments.

It seems to me the receiver ought to be made a party plaintiff, and it ought to be done rather than to substitute [46] him, so that there can be no doubt whatever of what is going on here.

It seems to me counsel has no point except he is fearful there may be another party represented by a new attorney, and he would have to answer three instead of two. Heretofore he hasn't had much trouble answering two instead of one.

We are going to continue to represent the receiver just as we have represented the plaintiff. If the receiver bounces us out, there will be no funds to continue us in and to present a third point of view.

I think the motion ought to be granted really as

a matter of routine. The form of order which we propose has been attached to the moving papers. Does the court have the papers in front of him?

The Court: Yes, I think they are all attached to the motion.

Mr. Lasky: In fact I think the plaintiff might have been subject to some criticism had it not called to the court's attention what had occurred.

The Court: The only thing that occurs to me is that in the form of order as you have prepared it, it is stated that "Bayard was appointed and now is the receiver of the plaintiff corporation to take charge of its estate and effects and to collect the debts and properties due and belonging to it with power to enter his appearance in and to prosecute and defend [47] in the name of said corporation or otherwise, all suits and proceedings which may be necessary or proper for the purpose aforesaid." If that is the case, how can the plaintiff remain in the case?

Mr. Lasky: Rule 25 (c) says the case may be continued in the name of the plaintiff or the new party may be substituted, or they both may be continued together. The only good reason why they both should be continued——

The Court: This motion is made both by the plaintiff and the receiver?

Mr. Lasky: Jointly.

The Court: Then he is your client?

Mr. Lasky: That is right. We appear as attorneys for both the receiver and the plaintiff, and we both ask that he be joined.

The Court: I don't see that there can be any harm in this, Mr. Adams. I am inclined to agree with Mr. Lasky, and I don't think you could have any more trouble than you have heretofore had. All right, I will grant it.

Mr. Lasky: Have you the form of order which was submitted?

The Court: I will sign the order.

Mr. Lasky: It brings us now to the matter of proposed findings, and in proposing findings we were very careful to heed the admonition of the opinion that proposed findings should not stray away from the basis of the opinion. And so if your [48] Honor has our proposed findings——

The Court: Yes.

Mr. Lasky: Proposed findings No. 1, as you see, adopts the opinion and its statement of facts as our proposed finding.

The Court: Let me interrupt you. Does the defendant object to all of your findings?

Mr. Lasky: Apparently to all of them.

The Court: All right.

Mr. Lasky: Every one of them.

Now our findings were to serve four purposes. One purpose your Honor has already ruled on.

The Court: Let me ask you another question, if I may. Has the defendant proposed any findings?

Mr. Adams: We have served, your Honor, and there is in the files our objections to the plaintiff's findings. We do not propose any, but we filed the objections to plaintiff's in which we have taken each one up in turn.

Mr. Lasky: As a matter of fact, counsel served us with a notice some time ago that they would not propose findings. That is correct, is it not?

Mr. Adams: That is correct.

Mr. Lasky: We waited until they had so advised us.

We had four purposes in mind with our proposed findings. One of them your Honor has already heard discussed, because it was the subject matter of Mr. Levy's remarks. [49]

The Court: I have been at law and motion from ten o'clock until about quarter to one, and I think the reporter ought to have about five minutes recess.

(Recess.)

Mr. Lasky: As I was saying before the recess, the purposes of our few findings are four-fold.

One of the purposes was in connection with the refund. We have discussed that, and that disposes of that.

There was one other main purpose, and that is this: Your Honor's opinion in major part, as we understand it, decided the case on the basis that the taxes ought to have been paid the government; that the settlement, to quote from the opinion, "invited a type of scrutiny that the court could not give it," and that if you were able to do so, you would set it aside. "The tax escape was erroneous and unjust." More of that quotation. And consequently, the court of equity would decline to intervene.

As has been indicated so far this afternoon, that

sounds on the principle that the court will not interfere between wrongdoers, or possibly like the doctrine of unclean hands.

So the first group of requested findings, three, four, five, six, seven and nine are directed to this. In essence, they go to the fact that the plaintiff is not in *pari delicto*; that the plaintiff did not itself conduct the tax transaction.

In their objections defendants' counsel have said that [50] these findings relate to the subject of duality, but they are not directed to duality at all. Your Honor has indicated your views with reference to duality in your opinion, and we say nothing about them. This merely goes to the point that the plaintiff itself did not conduct the tax operations, had nothing to do with them until the time of settlement, so that if there is some wrongdoing involved there we were not in *pari delicto* on it. The facts we present are all true. They cannot be contested on the grounds of accuracy, although counsel does in his objections.

We believe we are entitled to have those as part of a set of findings so the whole subject can be properly appraised above.

Counsel in his objections picks out some of these findings and says this, that or the other is untrue. I respectfully submit that the proposed findings are true.

In the court's opinion, the court finds and discusses the doctrine of the tax transaction, and we accept that finding for whatever it may be worth.

I do not know that we can profitably spend time going through these six or seven findings with respect to the detail. It does seem to me there was no dispute on the detail.

Another purpose of the proposed findings may be found in proposed finding No. 2.

It seemed to us, if the court please, that time [51] relationships may well be important. The court's opinion had some dates in it; other dates it did not have in it. For example, I do not think the date on which the claim for refund was filed was there, and it seemed to us it would be very convenient if those dates could be before the Appellate Court in quick, compact form. That is the purpose of proposed finding No. 2.

The fourth purpose of the findings was perhaps to correct certain respects in which it seemed to us the opinion was inadvertently erroneous.

For example, there is the statement that the claim for refund was withdrawn. Actually it was not withdrawn. It was rejected by the government and no suit was brought thereon.

The Court: Well, I suppose I considered the two which you have mentioned more or less synonymous because of the fact that that was part of the arrangement of settlement. As I understood, the evidence was that, whether the claim was rejected or abandoned, it was not allowed, and the returns for 1943 and 1944 were allowed. So if you wish to substitute some other language in that that is more accurate, that will be all right.

Mr. Lasky: That was in fact covered in proposed finding No. 8 which takes up the settlement in precisely the form in which it occurred.

The Court: Where do you take that from? What part of the [52] record does that finding No. 8 come from?

Mr. Lasky: Proposed finding 8?

The Court: Yes.

Mr. Lasky: The exhibits show what was done. There was a letter written to the Commissioner and there was a letter in reply.

The Court: You took it directly from the letter?

Mr. Lasky: That is right. There is nothing showing that the Secretary of the Treasury ever approved, and the fact that the statute of limitations ran and the date is shown by a letter written by Mr. Polk which is in the file. It is referred to in our brief. As a matter of fact, it is stated that the statute ran by such and such a date. It seemed to us that those facts could well be stated in compact form.

Those were the several purposes of the findings, but the principal purpose, as I have said, would be to show that the tax settlement was conducted by defendants' tax counsel, so that the plaintiff itself, if there were any impropriety, if there were wrongdoing, if this doctrine of unclean hands applies, then we do not come in; we were not in *pari delicto*.

I think all the facts here are correct. Counsel has picked out some of these facts, and I am prepared to proceed with them in whatever way your

Honor thinks is appropriate to take care of them or just to submit them.

The Court: As to No. 10, I was not attempting to find why the Bureau did it; I just simply said that I did not think [53] it was right, that was all.

Mr. Lasky: Frankly, our purpose was this——

The Court: I don't know what motives the Bureau of Internal Revenue had.

Mr. Lasky: Here is a specific finding that there was no fraud. Of course we disagree with the conclusions your Honor arrived at. And unless there was fraud, we do not see how the court should decline to determine the equities in this case on the ground that the tax belonged to the government, the Internal Revenue Department, if the government had all the facts before it. Certainly counsel for the defendant agreed that all the facts were before the government, and the finding that they substitute for No. 10 is perfectly agreeable to us.

The Court: There is a substitute for No. 10?

Mr. Lasky: Yes, counsel has criticized these findings and has proposed some substitutes, and the one proposed for No. 10, so far as we are concerned, is just as good as No. 10 itself. He proposes for No. 10:

“The evidence discloses that the Bureau of Internal Revenue was informed as to all pertinent facts in connection with its consideration of the tax settlement and there is no evidence that the Bureau was in any way deceived or misled.”

The Court: Do you want me to make that as a finding? [54]

Mr. Lasky: I would be glad to have that as a finding.

The Court: There is no evidence in this case at all concerning that matter. I am not going to make any finding about what the Bureau of Internal Revenue did concerning this matter. The only evidence before me in this case was the documents concerning this settlement.

Mr. Lasky: We have stated it the other way.

The Court: There was some evidence by the attorney of the fact that he had conferences with them, in his report, in the letters which he wrote, but I do not feel that it is incumbent upon me to make any finding. I am not passing on whether the Bureau had all the information in front of it or whether they were deceived or misled or not. My holding in the case is that these taxes were owing to the United States and they should have been paid, and I think the decision of the Bureau was wrong, and that is all I said in my opinion. And I did say that I think it should be scrutinized further, but the conclusion I came to was that, under the statute or any pertinent regulations, that the Bureau of Internal Revenue was entirely wrong in approving this settlement.

Mr. Lasky: Then proposed finding 10, as we——

The Court: I only said that in connection with discussing the equities, the principles which would apply in fairly determining this litigation. I do not feel that I would want to make any finding on that subject at all. [55]

Mr. Lasky: That is why our proposed finding, I thought, was better than their substitute. Their substitute asked for an affirmative finding that the evidence shows disclosure. Our proposition was simply that it did not disclose any fraud, and it certainly does not.

The Court: No, but that isn't an issue in the case.

Mr. Lasky: It seemed to us that it became related to the basis of the opinion.

The Court: It is sort of insinuated into it.

Mr. Lasky: Yes, the unclean hands doctrine, parties to a wrong, the court would not interfere because the taxes should have gone to the government and they have not; it invited a kind of scrutiny the court could not give it. The implication was that there may have been something wrong about it, consequently this court would have nothing to do with the situation. That is certainly the implication we got out here. If that is so, certainly the evidence did not disclose it, and the evidence certainly discloses that the tax operations, however they may be characterized, were conducted by the defendant and its tax counsel, not by the plaintiff.

The Court: There is no question about that.

Mr. Lasky: And that is the whole purport of the findings. Let me take them up again.

Proposed finding No. 1 adapts the court's opinion.

Proposed finding No. 2 states those dates merely for [56] convenience.

Proposed findings 3, 4, 5, 6, 7 and 9 have to do

with what your Honor stated the evidence clearly shows, and proposed finding No. 8 had to do with the way and the nature in which the settlement was carried out with the government, which we took directly from documents.

As for any details of language——

The Court: I see that counsel for the defendant rephrased every one except the first.

Mr. Lasky: Yes. In doing so——

The Court: Do you object to his form?

Mr. Lasky: Yes, because it is not rephrased at all. What he has done is to say, "Your finding ought to be rephrased," and he has gone off on a different subject and repeatedly finds what your Honor in your opinion has held to be otherwise.

The Court: Let's see.

Mr. Lasky: I am prepared to submit our phrasing and counsel's phrasing and let your Honor determine that as you see fit, because I think it is rather unprofitable to stand in a court room and kind of bicker around about whether there should be one word or another. Your Honor is thoroughly familiar with the law.

The Court: I just want it clear, Mr. Lasky, your purpose in these findings is not in connection with the issue of duality [57] but for the purpose of having a finding in the record as to the non-participation of the plaintiff in the so-called tax settlement.

Mr. Lasky: To sum it up briefly, correct. You expressed your views on duality in the opinion and we are not trying to alter or touch that subject at all.

The Court: Why couldn't one finding be sufficient to cover that, then; that the court finds that in the preparation of the documents, in the conferences and in all matters having to do with the settlement arranged with the Bureau of Internal Revenue, the plaintiff did not participate? Couldn't you simplify that by making one finding?

Mr. Lasky: Possibly we could do so.

The Court: I mean, if that is your sole objective there.

Mr. Lasky: Your Honor's opinion of course also referred to the signing of various papers by the plaintiff's president. Of course Mr. Curry was the plaintiff's president, and our point here was that while he signed them, that really was not the plaintiff's act.

The Court: Didn't I say too the Board of Directors were not——

Mr. Lasky: I think you may have said it with respect to some matters but not others. I don't think it was said with respect to the power of attorney.

The Court: I see. [58]

Mr. Lasky: Perhaps I can suggest this to the court: The court knows what our point here was. Perhaps we could just leave it with the court to phrase it in a way you think appropriate.

The Court: Can you come to some agreement as to what form you want the findings in? In other words, would it be satisfactory to both sides if the court were simply to say the opinion, insofar as

it states any factual matters, constitutes a finding of fact, and, in addition, the court finds as a fact that the plaintiff corporation did not participate in the matters that we have just referred to? Would that be sufficient?

Mr. Lasky: On those dates, I think. It might be convenient to include dates.

The Court: Is there any dispute about that No. 2 finding?

Mr. Adams: Does your Honor wish to hear from me?

The Court: Yes, I was just wondering whether we couldn't shorten the matter by having some comment.

Mr. Adams: I would like to make one or two general comments.

In the first place, your Honor's opinion stands as findings under the rule. Of course there is no technical requirement of any further order from this court; the opinion shall stand as findings.

Your Honor in his opinion stated, however, that if the [59] parties desired, they might present findings upon the essential equitable considerations upon which the decision is based. These findings are not of that character. They do not deal with any of the essential equitable considerations, and, as we view it, as we think, contrary to what Mr. Lasky's impression of the matter is, that these findings have to do with duality of control and nothing else.

Mr. Lasky, however, suggests they may also have

to do with the extent of participation of the plaintiff corporation in the tax transactions with the government. That idea had not occurred to me, and I would like to respond very briefly to it, and respond to the text of the finding that he proposes so as to show your Honor the characteristic objection we have to the proposed finding in that regard.

The plaintiff's proposed finding No. 2 is a finding that the returns for the first four months of 1944 and the claim for refund were filed by the defendant, meaning of course the reorganized railroad company. Of course the fact is, and there is no dispute about it, that the returns and the refund claim were filed, as the law required, by the plaintiff as the parent corporation in the affiliated tax group and signed by the plaintiff's president. But what plaintiff's counsel have in mind is their assertion that that conduct was in fact the conduct of the defendants through duality and not otherwise. Then it is further—— [60]

The Court: Didn't I make a statement in the opinion that the returns were filed by the tax counsel?

Mr. Adams: Your Honor, I would like to address myself to that particular point, because I believe your Honor did say so.

I would like to recall to the court's mind that as early as the year 1946 when this litigation first began—and, in fact, before this lawsuit was filed out here,—the plaintiff corporation was fully advised that Mr. Polk, who was tax counsel, was acting

as tax counsel for the affiliated group of taxpayers in presenting the matter to the government, and ever since the very beginning and prior to the initiation of this litigation, that has been the understanding of the plaintiff, that Mr. Polk was acting vis-a-vis the government for the account of whomsoever made objections.

I would like to direct your Honor's attention to defendant's exhibit 30A, which is a letter addressed to Mr. Polk's firm under date of September 27, 1946, which contains this statement:

"Appreciating that your firm has acted as tax counsel for both the company and the corporation in the filing of the consolidated tax returns and in the proceedings pending before the Internal Revenue Department, we would of course not wish to take any steps which would in any way prejudice the claims [61] made in those returns."

I would like to ask counsel if I may borrow the transcript of the hearing before his Honor in August, 1947, the first half.

(The transcript was handed to Mr. Adams.)

Mr. Adams: Thank you very much.

Mr. Levy: I have no further use for it.

Mr. Adams: I am just going to read very briefly from a statement by plaintiff's counsel at page 26 of the record there. Mr. Goodrich said—this your Honor will bear in mind was in 1947:

"May I correct that briefly, Mr. Levy? My understanding is that an offer of settlement on behalf of the group of corporations was made by

the government to Mr. Polk, who was acting as tax counsel for the entire group, and had been for some time previously.”

From the record, your Honor, in this case, there is no doubt but what it was thoroughly understood by the plaintiff corporation ably represented by counsel at the time, that Mr. Polk’s position was that of one holding powers of attorney from all the members of the affiliated group in dealing with the United States government in that capacity. So that for plaintiff at this time to now suggest that what Mr. Polk did was not done for plaintiff corporation but only for defendant reorganized railroad company is shown by the record to be [62] mistaken.

I should state—I think I did, perhaps,—that the letter to Mr. Polk’s firm, the one from which I read, exhibit 37A, was addressed to his firm by Mr. Curry, the president of the corporation, but at the time with the advice of counsel who were then representing the corporation, actually looking towards the filing of the litigation in this controversy, which was filed in October, the next month.

Your Honor, we have filed objections to plaintiff’s findings which are referred to by counsel as picking at their findings. I don’t want to take your Honor’s time to run over these specific objections.

The Court: You do not ask that the court make any special findings?

Mr. Adams: Your Honor, we came to the conclusion that no findings were required and so notified

counsel, under the arrangement which was that we had some time to propose findings if we thought any were necessary. We gave them notice that we proposed none. They then had time within which to propose findings. We consider that none are necessary. We consider that those proposed are not within the direction of the court as to the findings that might be tendered.

The Court: I was not attempting to state to counsel that—I will put it this way: I do not think the court has the power to say, “I won’t make findings.” The court under [63] the law must make findings. However, the rule does provide that the court can include the findings in an opinion, although perhaps—and this is what I wasn’t too sure about, and I mean I think counsel should have an opportunity to make their own decision in that regard. I did not separately state findings in the opinion, although I think the opinion is perfectly sufficient to indicate the findings on factual matters upon which the decision rested. So that is why I put in the opinion that if counsel felt that findings should be set up some special way, that I didn’t want counsel to think that I was saying that, “I am not going to make any findings in the case,” because the court has a duty to make findings; it is just that I thought that what was in the opinion was sufficient unless counsel thought otherwise.

Mr. Lasky: I felt in major part it was sufficient. There are only a few things that we thought ought to be added to it.

The Court: Don't you think that most everything you have mentioned is really in the opinion some place or another? You are right, perhaps in proposing it in orderly concise form.

Mr. Lasky: I doubt it, if your Honor please. I made a careful study of it.

For example, your Honor did find that their claim for refund was filed in the name of the plaintiff, but you did not [64] state who did it or how it was done. When you spoke of the returns, you said they were filed by defendants or defendants' tax counsel.

The second sentence in finding No. 2 was designed to treat the claim for refund in the same way your Honor had treated the filing of the previous returns. I think we treat the power of attorney in the same way.

Your Honor had spoken rather indiscriminately of the filing by the debtor, and we thought that it became the debtor after a certain date. That is the whole purpose of finding No. 2.

It may well be—I think your Honor's suggestion of a while ago about a finding about participation in major part covers everything that we have in mind. If we could have finding No. 2, the finding your Honor suggested, and finding No. 8, I think that perhaps covers it, together with finding No. 10, your Honor, that the evidence disclosed no fraud committed by defendants' tax counsel on the Bureau of Internal Revenue. I know that the defendants do not object to such a finding. I can't see why they would.

The Court: You say finding No. 2?

Mr. Lasky: Finding No. 2.

The Court: Except that your opponent objects to the second sentence, I notice.

Mr. Lasky: That objection, I submit, has no merit, [65] because all we have done there is to treat the claim for refund in the same manner as your Honor in the opinion has treated the filing of the tax returns. Your Honor found the tax returns were filed by the defendants but you did not mention who filed the claim for refund, although you said in your opinion that it was filed in the name of the plaintiff. We felt that that ought to be treated in the same manner as the tax returns.

The Court: Your opponent is not satisfied with just your language that they were filed by the defendants, filed by the debtor. I suppose that assumes nothing more than the presentation of the document to the government.

Mr. Lasky: We certainly intended more than that. We meant the preparation of it, the whole task, the job of getting it ready and submitting it to the government, and it is certainly true in the same sense as it was true when your Honor put in as to the returns.

The Court: You are satisfied with No. 2 and with the general finding we have discussed about non-participation?

Mr. Lasky: Yes, your Honor.

The Court: What was the other one?

Mr. Lasky: The other one, I think, would be

that finding No. 8 ought to be there, and I am hopeful of something in the nature of finding No. 10.

The Court: I do not understand the purpose of that [66] No. 8. What has that got to do with the case?

Mr. Lasky: Finding No. 8, if your Honor please, is related to our argument we made earlier today upon the refund.

Your Honor disposed of our request for No. 7 by saying, "Well, the stipulation is in the record and the pre-trial order is in the record." And so they are. But the facts stated in No. 8 are not succinctly in the record, and it seems to us they could well be succinctly stated.

The Court: What is meant by the statement here that "The settlement with the Bureau of Internal Revenue was not entered into in the manner prescribed by section 3761 of the Internal Revenue Code"?

Mr. Lasky: This is what I meant by it: The only kind of a settlement which the law allows which is binding upon the government and upon a party so neither can break it is one which has been approved by the Secretary of the Treasury. There was no such settlement here. This was a letter written to the Commissioner asking a refund and the Commissioner rejects the refund. This merely fails to levy the deficiency assessment. If the Commissioner so desired to levy the deficiency assessment, he could have done it and he would not be

barred by this letter. If the plaintiff had filed a claim for refund, it would not have been barred by virtue of this letter. It never was carried out by him in the manner required by law.

Mr. Adams: That I disagree with. [67]

The Court: The Secretary of the Treasury does not have to approve every tax refund claim that is filed.

Mr. Lasky: Yes, your Honor, any settlement must be approved by the Secretary of the Treasury or it is not binding. That very matter was decided by the Supreme Court in the case of *Botany Worsted Mills vs. U. S.*, 278 U. S. 282. Unless the Secretary of the Treasury, or I think counsel for the Treasury, approves in writing, that is not a binding settlement, either party can escape from it. And that is the final proof in this case, that that settlement never went through in the manner prescribed by law.

Mr. Adams: I would like to answer that.

Mr. Lasky: It was effective only because neither party did anything further. Plaintiff did not sue for a refund; the government did not levy any deficiency assessment, and the settlement became effective only because the statute of limitations ran against the parties doing anything more.

Mr. Adams: Your Honor——

Mr. Lasky: Let me complete my thought. The evidence shows just how the settlement was made. A letter was written to the Commissioner. The Commissioner replied. It does not show that the Secretary of the Treasury approved that in the manner

required by section 3761 of the Code, and the case of Botany Worsted Mills vs. United States, 278 U. S. 282 holds that the only way a settlement can be made is in the manner [68] required by that section.

The Court: What is the importance of my making a finding in this case as to whether or not the settlement did not go through in the manner prescribed by the Code?

Mr. Lasky: It bears upon our right to the refund. We claim in fact a kind of an estoppel. Had it not been for the pre-trial stipulation that it should be deemed that this money had been refunded to the plaintiff, we would have been in a position up until a week or two before your Honor's opinion to have sued on that claim for refund. We did not. No such suit was ever filed, because we were relying upon the stipulation. Maybe our arguments as to the conclusions we contend for are not sound, but certainly we propose to make those arguments and the facts are there.

The Court: Mr. Lasky, what question would you be precluded from raising treating the opinion as findings of fact in this case in the higher court that this particular finding as you suggest would permit you to raise? I am not clear on that point.

Mr. Lasky: Your Honor is referring to finding No. 8?

The Court: No, all these findings. Can't you raise anything that you suggested here today as a mistake or error of law on the part of this court

that you have talked about today treating the opinion as a finding of fact?

Mr. Lasky: I think, your Honor, that since all the facts [69] we are speaking of are undisputed, whether your Honor found or not, we could search the record and find them. The question I am talking about is a practical problem. If certain facts are so, it makes it convenient and within the financial reach of the plaintiff to get them before the court in the form of findings rather than to dig up that record.

The Court: The trouble with that is that counsel always says, "These are the undisputed facts." And the other fellow gets up and says, "No"; then we spend long hours in trying to work out some language in the findings.

Of course there can't be any objection to those dates; but that one sentence does not save you any time or there isn't any expense involved in the matter. You could state that in your appeal brief and your opponent is not going to dispute that the consolidated returns and so forth were filed on those respective dates, May 15, July 15, June 15 and March 9.

Mr. Lasky: We don't know whether they would or not. If we want to write a brief we want to be able to quote for every sentence we put in our brief a reference to something. If we do not have it in the form of a finding, then we have got to refer to some document.

The Court: I could append that to my opinion,

put those dates in. As to those other matters, I do not think there is any question there that makes any great difference as far as [70] the record on appeal is concerned or your raising these questions.

Mr. Lasky: Well, perhaps the way it can be handled is to take our finding 2, the dates, append them to your opinion, together with the statement along the lines that your Honor mentioned before about participation in the tax operations, and that does it. I do agree that the dates that we have here should be appended to the opinion.

The Court: Suppose I look over this and see whether there is any serious omission here that I think should be corrected, so that you won't have to incur too much expense in printing something, and digging it out of the record yourself, I don't think there is very much to this, Mr. Lasky, but I will look through it to be sure.

Mr. Lasky: Very well, we will be very happy——

The Court: There can't be very much from what I have read of these proposed findings.

Mr. Lasky: We have tried to cut it to the bone in what we have submitted here.

The Court: The only thing is I like to do this work, but I think somebody ought to have prepared a form of findings, and you have to have a judgment in the case. There has to be a written judgment so that the other side can appeal. I will write it out if nobody else wants to do it.

Mr. Lasky: Of course we would be glad to do it.

The Court: A form of judgment should be prepared which recites that the court has set forth all

the findings of fact necessary for the decision in the opinion.

Mr. Lasky: Couldn't there be a form of findings which merely recites, Finding 1, the court adopts the opinion as rendered; Finding No. 2, such other findings as your Honor sees fit and you will have a set of possibly three findings. Then we have a formal document and we know when the time starts to run.

The Court: I don't like to be placed on the spot. Perhaps I had better do it myself.

Mr. Adams: Your Honor will bear in mind that the successful party will be quite willing to undertake the preparation of the necessary documents. I suppose that would be in order when the time comes for the preparation of it.

The Court: I would like to sign the findings and judgment and get through with this.

Mr. Adams: Yes.

The Court: It has been pending a considerable length of time. You can't tell when one of these cable cars might knock me down.

Mr. Adams: May I make this suggestion, your Honor: that the argument has now resolved itself down to whether or not your Honor shall append some dates. Your Honor decided, I take it, this afternoon that he was not going to make [72] a finding like No. 10?

The Court: No, I won't give that finding.

Mr. Adams: That is settled.

As regards finding No. 8, I take it a finding of

that character would be quite out of order for the reasons your Honor stated; and not only that, but it is not supported by the record and we think contains a misstatement of fact as to the date on which the statute of limitations expired. Certainly there is an attempt to make a finding on a matter that was never brought up before your Honor on the trial.

I suppose the point we have reached is whether or not the court is going to make a finding of some dates mentioned in No. 2. That seems to me to be utterly unnecessary. Those are settled dates.

Mr. Lasky: Then there should be no objection.

Mr. Adams: Nobody has ever quarreled about them. The objection is that it is merely finding something that the record shows beyond peradventure and it can be stated without possible argument.

The Court: Would you submit the two findings that you desire, the finding on the dates and the finding that you did not participate in the tax refund operations?

Mr. Lasky: I will endeavor to do so. I am leaving for Chicago at 7:00 o'clock in the morning to be gone for two weeks. [73]

The Court: I will prepare it myself.

Mr. Adams: Your Honor, could I say one word, not indulging too much on your Honor's time? You will understand, of course, frankly, in my judgment, any finding which he seeks discriminating between the one party and the other in its participation in the transactions with the government is utterly out of keeping with the record. The record shows upon

this point that the parties, if there were any controversy, willingly—I say willingly—agreeably to both parties, Mr. Polk continued to transact the tax business with the government for the account of whoever might be concerned. And under those circumstances I do not see how it can be said that the one party as against the other was any more or less involved in the negotiations with the government. I read your Honor the record on that, and the record shows that beyond the possibility of a doubt.

The Court: Of course after the litigation started something seems to have been overlooked in connection with the settlement with the government until after the trial.

Mr. Adams: The record here shows that plaintiff considered the withdrawal of Mr. Polk's power of attorney before that settlement came to the point where the letters were exchanged. All that record is before your Honor. The plaintiff corporation could have asked Mr. Polk to protest that settlement or it could have withdrawn his power of attorney, [74] so clearly Polk was representing every member of the affiliated group as it appears by his signatures in his relations with the government. I do not think this record could possibly be construed in any other way.

Mr. Lasky: I think the court is thoroughly familiar with what went on. I think nothing is gained by chewing that over again further.

The Court: No, I think perhaps not. I will

make up some kind of an order in this matter myself, gentlemen, and will have the clerk send you copies.

Mr. Adams: In that case will your Honor desire that either party be designated to prepare the form of judgment?

The Court: As long as I am doing it, it is very simple; I will draw that up, sign it and file it myself. The clerk can send you copies of it. Then if you wish to reargue any of these matters on a motion for a new trial, you have that right.

Certificate of Reporter

I, W. A. Foster, Official Reporter, certify that the foregoing 75 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER.

[Endorsed]: Filed Dec. 29, 1949. [75]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 26,508-G

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Plaintiff,

and

RUSSELL M. VAN KIRK, HENRY OFFER-
MAN, and J. F. FARLEE & CO., INC., a
Corporation,

Intervenors,

vs.

THE WESTERN PACIFIC RAILROAD COM-
PANY, et al.,

Defendants.

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT

Tuesday, February 1, 1949

Appearances:

MESSRS. BROBECK, PHLEGER &
HARRISON, by

HERMAN PHLEGER, ESQ., and

MOSES LASKY, ESQ.;

LEROY GOODRICH, ESQ.;

MAHLON DICKERSON, ESQ.;

A. PERRY OSBORN, ESQ.;

F. J. NICODEMUS, JR., ESQ., and

NORRIS DARRELL, ESQ.,

For the Plaintiff.

MESSRS. ROGERS & CLARK, by

WEBSTER V. CLARK, ESQ.;

JULES LEVY, ESQ., and

DAVID FRIEDENRICH, ESQ.,

For the Interveners. [1*]

* * *

The Court: It is your theory that if the parent company, absent any question of so-called duality or lack of representation, had joined in a consolidated return without any agreement as to the interest it might have in any recovery, that the law and equity would step in and say there was a right to participate?

Mr. Clark: That may or may not be so, your Honor, but if that had been posed at the proper time, may it please the Court, it is our belief that the theory of the tax statutes and the theory of equity under the circumstances of this case would have entitled the parent corporation to at least that portion of the savings which directly flowed

* Page numbering appearing at top of page of original Reporter's Transcript.

from the use of its stock loss which made those savings possible. Now, without commenting on the assertion of the basic right at this time, may it please the Court, this thing that we have called the duality does no more than to allow your Honor to look at the transaction as it existed at that time, and if you find it unfair, you have a right to right that wrong.

The Court: You say "unfair." You do not mean the transaction of filing a consolidated return?

Mr. Clark: Not with respect to the Government, your Honor, but I do say this: that where a parent corporation is caused to file a consolidated return, in those years, it having the election to have filed a separate return if it wanted to, and where in that return there is set up the parent's loss in the stock of the [17] subsidiary as an offset against subsidiary's income, thus saving subsidiary some \$21,000,000, we say, may it please your Honor, that the result in this case to date, namely, that the parent, who had the election to file the consolidated return and whose loss made the saving possible, gets not one penny of the transaction and the railroad claims it all, we say that is an unfair result.

The Court: What you are saying is really that the unfairness consists of depriving the holding company of participation in the fruits of the consolidated return.

Mr. Clark: Right.

The Court: You are not complaining that the procedure of filing the consolidated return was unfair?

Mr. Clark: No, your Honor. It is the failure to recognize the right of the parent in the result of having filed the consolidated return in which the parent's stock loss of \$75,000,000 was set up as an offset, and which resulted in the saving to the railroad company.

The Court: Then it does come back to what I asked you just a moment ago, that irrespective of any question of so-called duality or lack of representation upon the parent company, that there is a contention on your part that where the holding company does participate, no matter what the circumstances of the filing of the consolidated return, that there is in law an obligation of some kind to share the fruits? [18]

Mr. Clark: Right. [19]

* * *

Mr. Phleger: The first item, your Honor, is the tax return. I will first offer in evidence the corporation income and declared value excess profits tax returns for the calendar year 1942 of the Western Pacific Railroad Corporation, which I ask be marked Plaintiff's Exhibit 3-A. [61]

* * *

The Court: We will proceed on the theory that as the exhibits are offered they will be admitted unless there is an objection as to materiality.

Mr. Phleger: The first exhibit, Plaintiff's Ex-

hibit 3-A, is also identified as Interveners' Exhibit 188.

(The income tax return referred to was marked Plaintiff's Exhibit 3-A.)

Mr. Phleger: I will now offer, and request that it be marked Plaintiff's Exhibit 3-B, the corporation excess profits tax return for the calendar year 1942 of the Western Pacific Railroad Corporation, the plaintiff. That is also identified as Interveners' Exhibit 187. [63]

* * *

(The document referred to was marked Plaintiff's Exhibit 3-B.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 4-A, identified also as Interveners' Exhibit 190, the corporation income and declared value excess profits tax return of the Western Pacific Railroad Corporation for the calendar year 1943, which I ask be marked Plaintiff's Exhibit 4-A. [69]

* * *

(The documents referred to were marked Plaintiff's Exhibits 4-A and 4-B respectively.)

* * *

Mr. Phleger: I have here the returns for the corporation for the year 1944, which includes the returns of the subsidiary corporations for the first four months, a separate return having been filed by the Western Pacific Railroad Company, the subsidiary, together with its affiliates for the last eight months. These returns were filed on June 15, 1945, which is some six months after the property came out of the bankruptcy court. I will ask that the

income tax return for the year 1944, the Western Pacific Railroad Corporation, identified as intervenor's 192, be received and marked Plaintiff's Exhibit 5-A, and that the excess profits tax return for the same year, identified as intervenor's 191, be received and marked Plaintiff's Exhibit 5-B.

(Whereupon income tax return for year 1944 and excess profits tax return for 1944 were received in evidence and marked respectively Plaintiff's Exhibits 5-A and 5-B.) [72]

* * *

I now offer in evidence the claim for refund of the Western Pacific Railroad Corporation, covering taxes paid during the calendar year 1942. It is identified as intervenor's exhibit 193. I ask that it be marked Plaintiff's Exhibit No. 6.

(Whereupon claim for refund, 1942, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 6.) [75]

* * *

I will now ask that there be received in evidence and marked Plaintiff's Exhibit 7, a copy of the stipulation filed in this Court on September 5, 1947, entitled "Stipulation and Agreement between Plaintiff and Defendants relating to Agreement with the Bureau of Internal Revenue." That, may it please the Court, is [76] the stipulation which was the subject of some discussion this morning.

Mr. Adams: May the record show, too, that there

was an order entered by the Court upon that stipulation?

Mr. Clark: Yes, there was a pre-trial order requiring that stipulation be filed, your Honor.

(Whereupon copy of stipulation filed September 5, 1947, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 7.) [77]

* * *

Mr. Phleger: I will now read into the record the admissions of the defendants to plaintiff's request No. 2: "That from 1916 to April 30—," and this is the request No. 2, your Honor— "—1944, the corporation owned all the stock, both preferred and common, of the company." The subsidiary company's response admits that "from some date in 1916 to April 30, 1944, the plaintiff owned all the stock, both preferred and common, of the debtor in reorganization." The response of the Western Realty Company is: "admits that's from some date in 1916 to April 30, 1944, plaintiff owned all the stock of the debtor in reorganization except directors' qualifying shares." [75]

I will now offer in evidence paragraph 2 of page 3 of the defendant's brief as an admission:

"Plaintiff, herein called the holding company, was organized under the laws of the State of Delaware on June 29, 1916. It acquired and held the capital stock of the Western Pacific Railroad Company up to May 1, 1944. On that date the stock was transferred to the reorganization committee."

I will now offer the admissions of plaintiff's request No. 3. The request reads (reading):

"In 1935 the company went into bankruptcy under section 77 of the bankruptcy act in proceedings in the United States District Court for the Northern District of California, hereinafter referred to as the bankruptcy court, before Judge A. F. St. Sure, entitled 'In the Matter of the Western Pacific Railroad Company, Debtor, No. 26591S,' and it was placed by the court in the hands of the trustees in that year."

The response of the subsidiary company is (reading):

"Admit that on August 2, 1935, the debtor in reorganization filed a petition under section 77 of the bankruptcy act in the United States District Court for the Northern District of California and that all of the assets and property of the debtor in reorganization were vested in reorganization trustees on or about November 9, 1935."

The response of Western Realty is in substance the same. I [80] take it you won't require us to read it.

Mr. Adams: No.

Mr. Phleger: I will now direct the attention of the Court to the plan of reorganization of the subsidiary company. I will not offer it in evidence, because I take it that the Court may refer to it without it being placed in evidence, and we don't wish to unduly burden the files. That is recorded in 233 ICC at page 409, and is dated June 21, 1939. It contains the following statement and finding:

“The capital stock of the debtor is found to be without equity or value and the stockholders shall not be entitled to participate in the plan.”

I will now offer in evidence as Plaintiff's Exhibit 8 a copy of the order of the court, of the bankruptcy court, in the matter of the Western Pacific Railroad Company, approving the plan of reorganization for debtor. It is dated August 15, 1940, and contains the following finding, which is shown on page 5 of the exhibit (reading):

“Fourth: The finding of the Interstate Commerce Commission, at the time of the finding, the interests of unsecured creditors of the debtor and the equity of the holders of the debtor's preferred stock and the debtor's common stock have no value and that the holders of such unsecured claims and such shareholders are not entitled to participate in the distribution of new capital securities or other assets of the [81] debtor under said plan of reorganization is hereby affirmed, and said plan of reorganization shall not be submitted to said unsecured creditors or shareholders for acceptance or rejection.”

(Whereupon copy of order approving plan of reorganization for debtor referred to above was received in evidence and marked Plaintiff's Exhibit No. 8.)

* * *

Mr. Phleger: I will now offer in evidence as Plaintiff's [82] Exhibit 9 the opinion of the Court, the United States Circuit Court of Appeals for the

Ninth Circuit, the foregoing order was reversed, but on March 15, 1943, the United States Supreme Court reversed the Circuit Court of Appeals and affirmed the order of the District Court. *Ecker v. Western Pacific Railroad Company*, 318 U. S. 449."

* * *

I will now offer as Plaintiff's Exhibit 10 the order of the bankruptcy court, dated October 11, 1943, confirming the plan of reorganization. The decision of the Supreme Court that [83] I mentioned is March 15, '43, this order confirming the plan is October 11. This order confirmed the plan of reorganization as proposed by the Interstate Commerce Commission, and appointed a reorganization committee. I will read the language in paragraph second of the order (reading):

"Second: The designation of Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson as members of the reorganization committee provided for in article R of said plan of reorganization is hereby approved."

Ask that this be received as Plaintiff's Exhibit 10.

(Whereupon order confirming plan of reorganization referred to above was received in evidence and marked Plaintiff's Exhibit No. 10.) [84]

Mr. Phleger: I will now offer as Plaintiff's Exhibit 11 a copy of the agreement between the Western Pacific Railroad Corporation, the plaintiff corporation, the Chase National Bank of the

City of New York, the Central Hanover Bank and Trust Company, the James Foundation of New York and Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson, as the reorganization committee of the Western Pacific Railroad Company. That agreement is dated November 22, 1943. [85]

* * *

Mr. Phleger: Yes, this is a copy of the executed agreement. The agreement is executed in behalf of the Western Pacific Railroad Corporation by M. J. Curry, President; attest, John F. Wienken, Secretary, The Chase National Bank of the City of New York, by W. Arthur Grotz, Second Vice President; attest, William Morhmann, Central Hanover Bank and Trust Company [86] by R. G. Coombe, Vice President; attest, C. F. Parker, Jr., Assistant Secretary, James Foundation of New York, Inc., by William W. Carman, President; attest, Charles E. Andrews, Assistant Secretary; Reorganization Committee of the Western Pacific Railroad Company, by F. H. Ecker, Frank C. Wright and Robert E. Coulson. [87]

* * *

(The agreement referred to was marked Plaintiff's Exhibit 11.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 12 a petition filed in the bankruptcy court under date of August 23, 1944, by Whitman, Ransom, Coulson & Goetz and Pillsbury, Madison & Sutro as counsel for the petitioners, the petition of

the reorganization committee for an order approving the use of the debtor company in carrying out and making effective the plan approving the proposed amendments to the articles of incorporation and proposed new by-laws, and approving forms of preferred and common stock certificates and directing action with reference thereto. I will read three paragraphs. [88]

* * *

Mr. Phleger: I will now offer an order of the Bankruptcy Court filed on September 25, 1944, approving the use of the debtor company in carrying out and making effective the plan, approving proposed amendments to the articles of incorporation and proposed new by-laws of debtor company and approving forms of preferred and common stock certificates and directing action with respect thereto, and I ask that it be marked Plaintiff's Exhibit 13.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 13.)

* * *

Mr. Phleger: I will now offer in evidence as Plaintiff's Exhibit 14 the order of the Bankruptcy Court, which we call the revesting order dated November 27, 1944, order directing the revesting of properties of the debtor in the debtor company, fixing the date for consummation of the plan and authorizing and directing the carrying out of the plan.

Attached to the order and referred to therein are copies of the proposed form of deed of convey-

ance from the trustees to the company, and also a form of assumption agreement.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 14.)

Mr. Phleger: I now will offer defendants' admission to plaintiff's request 9:

"Pursuant to an order made and entered by the Bankruptcy Court on November 27, 1944, entitled, 'Order Directing the Revesting of Properties of the Debtor in the Debtor Company, fixing the Date for Consummation of the Plan and Authorizing and Directing the Carrying out of the Plan,' the reorganization trustees on December 29, 1944, transferred to the company all of the property vested in, possessed, held or used or controlled by the reorganization trustees."

The responses admit the facts. That is the date shown here, December 14, 1944, as being the date of the termination [92] of the bankruptcy proceedings.

I will offer as Plaintiff's Exhibit 15 the document we call the assumption agreement. That is an agreement signed by the Western Pacific Railroad Company, by Charles Elsey, President, and C. L. Droit, Secretary, dated December 14, 1944, which assumes certain obligations of the trustees in bankruptcy. I will read paragraph II of that agreement.

* * *

(The document referred to was received in evidence and marked Plaintiff's Exhibit 15.)

Mr. Phleger: I will now offer the following admission from the defendants' brief, the top of page 5:

"The holding corporation issued preferred and common stock which was listed and traded on the New York Stock Exchange and widely held by purchasers of railroad securities."

I will next offer as Plaintiff's Exhibit 16 the annual report of the parent corporation for the year 1941. This has been identified as Defendants' Exhibit 130; December 31, 1941. The testimony which will later be introduced will show that this was the last printed public report sent out by the corporation.

Mr. Adams: We intended to establish that fact ourselves.

Mr. Clark: I think that can be stipulated to, your Honor.

Mr. Phleger: I am chary of asking counsel for stipulations. I will direct the attention of the Court to the facing page of the report, which shows the officers as of December 31, 1941. They include H. Brua Campbell, Robert E. Coulson, Michael J. Curry, A. Perry Osborn, Thomas M. Schumacher, Willis D. Wood.

The executive committee consisted of the following: Robert E. Coulson, William M. Kingsley, Thomas M. Schumacher, Finley J. Shepard, Willis D. Wood, and the officers are shown to be Thomas M. Schumacher, President, and Michael J. Curry, Secretary and Treasurer, and Pierce & Greer, counsel.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 16.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 17 a sheet identified as Interveners' No. 50 headed "The Western [94] Pacific Railroad Corporation Schedule of Preferred and Common Stockholders of Record, September 11, 1935, to September 16, 1947. That would be Plaintiff's Exhibit 17.

I will direct the Court's attention to the fact that this exhibit shows holdings by the James interests in the parent corporation, proving the statements shown on the chart, that it held 8.8 per cent of the preferred stock as of November, 1943, and slightly less thereafter, and 61 per cent of the common stock at all times.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 17.)

Mr. Phleger: I will offer now the response to plaintiff's request 33:

"From 1925 until his death in 1941 Arthur Curtis James, individually and through certain wholly owned subsidiaries owned 8.8 per cent of the corporation's preferred stock and 61 per cent of its common stock together with substantial amounts of the corporation's secured bonds."

The railroad company's response admits, except they deny that the plaintiff ever had any secured bonds, and they deny that A. C. James individually or through any subsidiaries owned any

such bonds. The response of the Western Realty is the same. They did not own any bonds of the parent corporation.

Mr. Clark: There were no bonds outstanding, isn't that the [95] fact?

Mr. Phleger: Yes.

I will now offer as Plaintiff's Exhibit 18 a compilation identified as Interveners' Exhibit 342, headed "Securities of Western Pacific Railroad Company for the Period 1935 to 1947," which I ask be received and marked Plaintiff's Exhibit 18.

Mr. Adams: Mr. Phleger, this is limited to a statement of the securities owned by certain named persons.

Mr. Phleger: I will just point that out. I gave the heading on it. The heading I have read. The exhibit itself shows the holdings in the company of the so-called James interests. Not only its stock, but of bonds and collateral notes. They show as of 1945, or '46, whichever the date was, the conversion of 4½ per cent income mortgage bonds of the reorganized company, amounting to \$3,544,000, into common shares of the Western Pacific Company. That is, after reorganization, the James interests were the owners of 3½ million dollars' worth of bonds of the reorganized company, and at the time mentioned they converted those bonds into common stock. The exhibit I have just mentioned proves the basic facts which are shown on this chart. The bonds that I referred to are these bonds which, after the date of this chart, were converted into common stock.

The Court: That is Exhibit 1?

Mr. Phleger: This is Exhibit——

The Court: No, no, I mean the chart is Exhibit 1? [96]

Mr. Phleger: The chart is Exhibit 1, yes.

I now offer the admission from defendants' brief, page 6, reading as follows:

"Arthur Curtis James and his wife were the owners of all of the capital stock of the Curtis Southwestern Corporation, a New York corporation, and of Curtis Southwestern Company, a Delaware corporation, which in turn owned all of the capital stock of the A. C. James Company. Curtis Southwestern Company was the owner of 5 per cent collateral notes of the holding corporation."

I now offer as Plaintiff's Exhibit 19 a statement headed "The Western Pacific Railroad Corporation, Stockholders Meetings, 1935 to 1948," which is identified as Interveners' Exhibit 42, and shows the date of stockholders' meetings of the parent corporation during that period, and the dates on which there was a quorum present, the dates on which there was no quorum present, the number of shares represented at those meetings.

We will show later by the deposition of Mr. Coulson that there was never a quorum present during the period 1938 through 1944, unless the James stock was represented.

(The statement referred to was received in evidence and marked Plaintiff's Exhibit 19.)

Mr. Phleger: I will now offer as a group, as Plaintiff's Exhibit 20, the published annual reports of the Western Pacific [97] Railroad Company, a subsidiary company, as follows: 1942, 20A; 1943, 20B; 1944, 20C; 1945, 20D; 1946, 20E; and 1947, 20F.

(Annual reports, Western Pacific Railroad Company, referred to above, dated 1942, 1943, 1944, 1945, 1946 and 1947 were marked, respectively, Plaintiff's Exhibits 20A through 20F, in evidence.)

* * *

Mr. Phleger: Now I would like to call the Court's attention to certain statements and recitations in these annual reports. First is the report for 1942, No. 20A. The cover shows, "The Western Pacific Railroad Company, T. M. Schumacher and [98] Sidney M. Ehrman, Trustees in Reorganization." It is for the year 1942, and shows as officers as of the date December 31, 1942, among others, H. Brua Campbell, New York; Michael J. Curry, New York; A. Perry Osborn, New York; Thomas M. Schumacher, New York. It gives the executive committee as follows:

Thomas M. Schumacher, Michael J. Curry, H. Brua Campbell, Charles Elsey, and A. Perry Osborn. This is the railroad company.

Mr. Adams: Your Honor, at this point, if I may take a moment to state an objection to the score of materiality, so that I shall not have to repeat, once stated? Counsel has just read from the annual

statement the names of certain gentlemen designated upon the annual statement as directors and officers of the Western Pacific Railroad Company in the year 1942. Now, if your Honor please, from the year 1935, late in that year, to the end of the year 1944, those properties were in the possession of the trustees of the reorganization court, Mr. Schumacher and Mr. Ehrman. They had the title to the properties, they owned the properties, they operated the properties, and under the orders of Judge St. Sure the entire railroad organization was acting as employee and agent of those trustees. Mr. Elsey, by direction of Judge St. Sure at the beginning of the reorganization, was the agent for the trustees in the operation of those properties. But, your Honor, in 1935, Judge St. Sure issued his order enjoining this debtor railroad company, its officers and [99] directors, from having anything further to do with the operation of that property. That was in the hands of the trustees from then on, and these gentlemen whose names are called off as officers and directors,—as if that were significant in 1942—had in truth no functions, of any significance. They had no discretion, no power. They were nothing more or less than persons whom the court might direct in the pursuance of the court's operation and management of this railroad.

Nor was there, nor can there be, any duality shown by pointing to the names of these gentlemen at that time, as if this were a case in which these gentlemen had policies or powers or discretion of any sort, because they had not.

Mr. Phleger: I will be very glad to stipulate that during this period no meetings of either the executive committee or the directors were held. But I do think the fact that they held these positions, while it might not have given them any power, might have imposed upon them some duties.

The Court: Well, this is a published statement of the company?

Mr. Phleger: Yes, correct.

Mr. Clark: Well, just a moment; so the record may be clear, the intervener is not willing to concede that there were no meetings of the directors of the railroad company during this period of time, because I think charts which will come in evidence later will show that various people took office as directors [100] for the railroad company during the period of the railroad trusteeship that we are talking about in 1942.

Mr. Phleger: Yes, they took office in the fall, one, in 1944.

Mr. Clark: Well, some in 1940, too. Mr. Curry became a director of the railroad company in 1940, which is during the reorganization. So there must have been meetings during that time. And I think Mr. Adams will concede——

Mr. Adams: I think Mr. Clark's recollection is correct; as to this being a report of the company, your Honor, this is one of the reports that is put out during the period of trustee operation and management. It carries the names of the trustees and was a part of their function, the making of the report.

The Court: These directors were all holding office with the consent of the trustees?

Mr. Phleger: Obviously.

Mr. Clark: Apparently.

Mr. Adams: Yes, your Honor.

Mr. Clark: And they were holding meetings, your Honor, and the only purpose of my statement is—I don't want the intervenor in the case bound by the concession which Mr. Phleger was apparently willing to make.

Mr. Phleger: I probably am in error in that, but during certain periods they did not hold meetings.

I will call the Court's attention to the fact that this is, [101] of course, a report of the trustees in reorganization also, and as a published report, also is binding on the trustees. So the trustees, by the publication of this report, must have approved the statement that I have just read as to who held the offices.

Mr. Adams: Nor can there be any doubt that the corporate function, the function of the Board of Directors of the company during the period of reorganization, was enjoined and frozen and suspended by order of the reorganization court, and that the entire function of management, controlling the operation of the proceeding during that period, was the court's function and the trustee's function and not the function of the directors, who had no power.

The Court: Well, I suppose that as long as the

directors didn't do anything but that which had to do with the actual operation,—

Mr. Adams: The only function they had was to do what the trustees desired them to do and that the bankruptcy law required of them.

Mr. Phleger: Of course, during all of this period, as the reports and evidence will show, all of the transactions, with minor exceptions, were conducted in the name of the corporation by its corporate officers. Mr. Elsey always acted as president of the corporation. The consolidated tax returns were filed by Mr. Elsey as president of the corporation.

Mr. Clark: That is the railroad company? [102]

Mr. Phleger: That is right.

Mr. Clark: Not the Corporation.

Mr. Adams: Yes, and that was done pursuant to the explicit direction of Judge St. Sure, by his order of November 9, 1935.

The Court: Well, that all indicates that the corporate directors, or the officers, were delegated by the bankruptcy court. They were just prohibited from performing any functions having to do with the property and assets and the business of the company. But apparently the reorganization court wanted to make use of them as a part of the corporate entity in order to carry out some functions.

Mr. Adams: Your Honor, the reorganization court's orders would be the best evidence, of course, of the court's purposes; and they were cited, and the trustees are directed to engage Mr. Elsey, who

was the president of the railroad company, to act as their agent, the trustees' agent in the operation and management of the property. And they direct the trustees to take into their organization the going railroad organization. So that all the acts, all the records, all the reports, were carried on in the form as theretofore.

The Court: Well, that must have been with the approval of the trustees.

Mr. Adams: It was, with the explicit approval of the court itself, by direction of the court, your Honor. The trustees, of course, went to the court asking for such order. [103]

The Court: Well, I guess we are getting pretty far afield now. You say that is not material?

Mr. Adams: My point is that these gentlemen are spoken of here as directors as if they had some position adversary to the other corporation, the plaintiff; because Mr. Phleger was mentioning certain gentlemen who held relationships to the plaintiff. [103A]

The Court: Well, of course, it seems to me that whatever objection there might be there is all with reference to the weight that might be given to that, rather than to its admissibility at this moment.

Mr. Adams: I spoke of materiality, and I don't want to repeat myself frequently on this; but it is a very significant and important thing in our judgment that the duality which we have here spoken of so constantly is not a duality between two different companies, it is a duality between the plain-

tiff's corporation, which brought about this reorganization proceeding initially, and the court's trustees. That was the object, the main object, of my remark at this moment.

The Court: Well, this is just one isolated bit of testimony, which I can't evaluate separately until I have it all. Then maybe it won't have any weight and maybe it will have some weight. But I don't think that I should rule on it now—then I don't know whether at a later time, if it were entitled to have any weight, how I could reinstate it.

Mr. Adams: Well, I would assume, since the objection stated was as to materiality, I take it that objections on that score are not waived in any court.

The Court: Well, they might be, but there are some things that we could rule out as being immaterial if the immateriality is just obvious, right on the face of the document, or other evidence that is sought to be introduced. But it is not so [104] clear that I could make that kind of a ruling now. I think that what we have said in the record now is such that any rights that you may have are reserved. I will overrule the objection.

Mr. Adams: Very well, your Honor.

Mr. Phleger: I think I was reading the list of the executive committee. It consists, according to this report, of Thomas M. Schumacher, Michael J. Curry, H. Brua Campbell, Charles Elsey, and A. Perry Osborn.

I will recall to your Honor's attention that Schu-

macher, Curry, Campbell and Osborn were directors of the parent company.

Now, here is a list of the officers as of December 31, 1942: T. M. Schumacher, Chairman of the Executive Committee, New York; Charles Elsey, President, San Francisco; and M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer, New York. As the evidence will show a little bit later, Mr. Curry, during this entire period, was conducting affairs and handling matters in his name as holder of the office of Vice President, Assistant Secretary and Assistant Treasurer.

Mr. Clark: Of the railroad company.

Mr. Phleger: Of the railroad company. [105]

* * *

I will now refer to Plaintiff's Exhibit 20-B, which is the report for 1943:

* * *

Mr. Phleger: The facing sheet on that report also contains a list of the corporate officers as of the end of 1943. It shows as directors: Michael J. Curry, A. Perry Osborn, Thomas M. Schumacher, and as executive committee Thomas M. Schumacher, Michael J. Curry, Charles Elsey and A. Perry Osborn. It shows as officers T. M. Schumacher, Chairman of the Executive Committee; Charles Elsey, President; M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer; and Pierce & Greer, counsel, 40 Wall Street, New York. The preceding annual report also contained the name

“Pierce & Greer, counsel, 40 Wall Street, New York.” I think I overlooked reading it. [106]

Now, I would like to read and call your Honor’s attention to a statement appearing on page 6 of that report with respect to taxes:

“Owing to an unusual situation resulting from the recent final confirmation of the Plan of Reorganization, no accrual was set up in respect of Federal income and excess profits taxes for 1943.

“Since 1916, Federal tax returns of this company have been made through a consolidated return filed by its parent holding company, The Western Pacific Railroad Corporation, which parent owned all of the capital stock of its subsidiary, The Western Pacific Railroad Company. The confirmed Plan of Reorganization for the railroad company characterizes the capital stock owned by the holding company as being ‘without equity or value.’

“A consolidated tax return for 1943 can and will be filed by the holding company. Tax counsel has advised that the holding company’s loss on its stock of the railroad company will result in elimination of any liability of the holding company for Federal income taxes for the year 1943 and therefore indirectly eliminate such taxes for the subsidiaries of the holding company. However, pending a final settlement with the Treasury Department, the Reorganization Trustees, [107] by authority of the court, have set aside a contingency reserve tax fund of \$7,100,000 invested in United States Government Treasury savings notes—Series

C. The credit tax accrual of \$9,886.13 results from an over-accrual in 1942.”

Mr. Adams: And may the record show that this again is a report published by Schumacher and Ehrman as trustees?

Mr. Phleger: That is correct.

The Court: That was in the end of 1943?

Mr. Phleger: December 31, 1943.

The Court: After the plan had been confirmed?

Mr. Clark: The evidence will show, your Honor, that that report came out in about May of 1944, about the year 1943.

Mr. Phleger: Yes. I think it was May of '44.

Mr. Clark: It was just about a month before the consolidated return for 1943 was signed by Mr. Curry as president of the holding company.

Mr. Phleger: Now I will refer to Plaintiff's Exhibit 20-C, which is a similar report for the year ended December 31, 1944. I direct the Court's attention to the fact that the directors, as of December 31, 1944, do not include any of the gentlemen residing in New York, whose names I have read. They are local people, for the most part. Well, they are local and Eastern people. But they do not include Schumacher, Osborn, Wood or Curry. Under the list of officers, however, are the following: [108] Charles Elsey, President; M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer.

I direct your Honor's attention to a note appearing on page 6, under the heading "Taxes":

"Prior to the period of reorganization, which be-

gan August 2, 1935, and through 1943, the company's tax returns had been made by the then parent, The Western Pacific Railroad Corporation, a holding corporation which owned all of the company's preferred and common stock, except directors' qualifying shares. The holding corporation filed a consolidated return for itself and its various subsidiaries, of which The Western Pacific Railroad Company was one.

"The plan of reorganization for The Western Pacific Railroad Company was confirmed on October 11, 1943, and found the preferred and common stock (owned by the holding corporation) to be 'without equity or value.' As a result of this loss, the consolidated return indicated no liability for 1943 Federal income or excess profits taxes. To provide against the contingency that liability of the railroad company for some taxes in respect of 1943 might be subsequently asserted by the Commissioner of Internal Revenue, the Reorganization Trustees obtained authority of the Court to set [109] aside a reserve fund of \$7,100,000 invested in Government securities."

". . . This entire reserve will be held intact to protect the cash position of the company in the event it should be later necessary to make any payment of taxes or interest resulting from an administrative or judicial ruling adverse to the company's contention that it was not liable for any Federal income or excess profits taxes for the calendar year 1943 and the first four months of 1944."

I call your Honor's attention to the fact that the return for '44 was not filed until June 15, 1945, which was six months after the company came out of bankruptcy; and that the reserve fund for \$3,000,000 was not set up until March 26, 1945, which was approximately four months after the property came out of bankruptcy.

Mr. Clark: Three months.

Mr. Phleger: You are right. [110]

* * *

Intervenors' Exhibit 410(d).

Mr. Phleger: I will now direct the Court's attention to Plaintiff's Exhibit 20-D, which is the annual report for the year 1945.

By the way, I might mention that the preceding exhibit, for the year 1944—never mind.

The report for 1945, 20-D, contains no reference to the trustees in bankruptcy. The facing sheet does not list as officers any of the persons whose names I have previously read. It does not include Mr. Curry or the other gentlemen. [110A]

Mr. Phleger: On page 6 there is the following statement with respect to taxes:

“Detailed information was given in last year's report of the reorganization trustees relating to the situation of the company with respect to Federal taxes for 1943 and the first four months of 1944. To provide against the contingency that liability of the company for some taxes in respect of 1943 might be subsequently asserted by the Commissioner of Internal Revenue, a reserve fund of \$7,100,000 was

established in 1944. On March 26, 1945, the board of directors authorized the increase of this fund to a total of \$10,100,000 to cover such a contingency for 1943 and the first four months of 1944. The entire fund is invested in Government securities and will be held intact to protect the cash position of the company should it be necessary to make payment of taxes or interest as a result of an administrative or judicial ruling adverse to the company's contentions."

I now call your attention to the report for the calendar year 1946, Exhibit 20-E. That contains the statement on page 11 with respect to taxes:

"As previously stated, the company's income for 1946 was in no degree attributable to the carry-back [111] provisions of the excess profits tax law. Information has heretofore been given in the reports for 1944 and 1945 as to the situation existing in connection with Federal income taxes for 1943 and the first four months of 1944 and the \$10,100,000 reserve fund which has been set aside to cover the contingency that liability of the company for some taxes during those periods might subsequently be asserted by the Commissioner of Internal Revenue. The question has not yet been settled and until the discussions with the Income Tax Bureau have been definitely concluded, the reserve will be maintained. The subject of payroll taxes has been heretofore discussed in connection with wage costs."

And on page 12 the following statement under the

heading of "Litigation." This is the report for the year 1946. I will call your attention to the fact that this suit was filed on October 10, 1946.

"In October, 1946, another action was brought by the former parent company in the United States District Court for the Northern District of California, Southern Division, against the Western Pacific Railroad Company and its subsidiaries. The complaint asserts a claim by the parent company based on savings in Federal taxes which may be realized by the defendant companies under consolidated tax returns for the years 1942 and 1943 and for the first four months of 1944, and a refund claim for the year 1942. The defendant companies have filed an answer denying liability, as well as a counterclaim seeking determination that the plaintiff corporation has no interest in any such prospective tax savings. The case has not been set for trial. In March, 1947, certain stockholders of the plaintiff corporation applied to the court for leave to intervene in this action. At the date of this report the application had not been heard by the court."

I now refer to the report for the last year, 1947, Plaintiff's Exhibit 20-F, page 12:

"Information has been given in previous reports as to the situation existing in connection with Federal income taxes for 1943 and the first four months of 1944 and the \$10,100,000 reserve fund which had been set aside to cover the contingency that liability of the company for some taxes during those periods

might subsequently be asserted by the Commissioner of Internal Revenue. The Treasury Department has notified the company that the tax returns for the periods prior to May 1, 1944, have been accepted as filed. The \$10,100,000 fund, [113] previously reserved against contingent tax liabilities and invested in U. S. Government bonds, has since been retained as a reserve fund for contingent liabilities in litigation, awaiting the outcome of law suits now pending. Tax returns filed for the periods subsequent to May 1, 1944, have not as yet been audited by the Treasury Department.”

Under the heading of “Litigation.”

“Reference was also made in the report for last year to another action brought in October, 1946, by the former parent company in the United States District Court for the Northern District of California, Southern Division, against the Western Pacific Railroad Company and its subsidiaries, asserting a claim by the former parent company arising out of savings in Federal taxes which may be realized by the defendant companies under consolidated tax returns for the years 1942 and 1943 and for the first four months of 1944, including therein a claim for refund of taxes paid for the year 1942. The stockholders of the former parent company who had petitioned for leave to intervene at the time of the last report were subsequently allowed to intervene and they are actively supporting the plaintiff’s claim. The taking of certain [114] depositions in this action commenced in New York City

on February 9, 1948, and will probably continue throughout a period of several weeks."

I will now offer as Plaintiff's Exhibit 21 a sheet headed "The Western Pacific Railroad Company, Schedule of Officers, August 1, 1935, to February 9, 1948." That sheet is also identified as Interveners' Exhibit 26.

Mr. Clark: That is of the corporation, the holding corporation, isn't it?

Mr. Phleger: Western Pacific Railroad Corporation.

Mr. Clark: I thought I heard you say "Company." I am sorry.

Mr. Phleger: No, it is the corporation. I will not stop to read the list of officers, but the list of officers shown supports this chart as to the period covered by the chart; Schumacher, President; Curry, Secretary; Curry, Treasurer; Curry, President; Wienken, Secretary; Valouch, Vice President and Secretary. [115]

* * *

Wednesday, February 2, 1949—10:00 A.M.

* * *

Mr. Phleger: The last exhibit admitted in evidence yesterday was Plaintiff's Exhibit 21. I will now offer as Plaintiff's Exhibit 22 a sheet headed "The Western Pacific Railroad Corporation, Schedule of Directors, August 1, 1935, to February 9, 1948." That is also identified as Interveners' Exhibit 27. The schedule shows that these directors shown on Plaintiff's Exhibit 2, Schumacher, Curry,

Valouch, Sheehan, Wienken, Osborne, Wood and Hatton, served during the periods shown upon this chart, this chart covering the period June 1, 1943, to October 10, 1946.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 22.)

Mr. Phleger: I will next offer as Plaintiff's Exhibit 23, also identified as Interveners' 44, schedule headed "The Western Pacific Railroad Corporation, Schedule of Payments Made to Officers, Counsel and Employees during the Period August 1, 1935, to December 31, 1946." May it please the Court, this exhibit supports the facts shown on Plaintiff's Exhibit 2 with respect to the fact that the officers and directors shown on it under the heading of "Officers and Directors of the Plaintiff Corporation" received no compensation for services during the [116] period shown by this chart.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 23.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 24, also identified as Interveners' Exhibit 5, a sheet headed "The Western Pacific Railroad Corporation, Schedule of Payments made to Pierce & Greer or H. Brua Campbell January 1, 1942, to December 31, 1945." The firm of Pierce & Greer are shown on the chart, Plaintiff's Exhibit 2. The members of that firm, as will appear from the evidence, consist of Mr. Nicodemus and Mr. Camp-

bell. The evidence already introduced shows that during this period they were general counsel for the plaintiff corporation, and as shown by the reports of the defendant company in evidence, they were shown as counsel for the company through 1943. We will show by subsequent evidence that they were counsel for the company and received compensation for a later date. I direct attention also to the fact that this exhibit shows that there was no compensation received by Pierce & Greer from the plaintiff corporation for services rendered after May, 1943, through December 31, 1945. That is, while counsel for the plaintiff corporation they received no compensation during the period shown on that chart.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 24.)

Mr. Phleger: I will now offer in evidence as Plaintiff's [117] Exhibit 25 a sheet identified also as Interveners' Exhibit 45 headed "The Western Pacific Railroad Company, List of Corporate Officers and Terms Thereof, January 1, 1935, to February 12, 1948." I direct the attention of the Court to the fact that this exhibit supports certain of the statements contained on Plaintiff's Exhibit 2. It shows that M. J. Curry, the president of the plaintiff corporation, was the vice president, assistant secretary and assistant treasurer of the defendant railroad company during the period January 1, 1935, through to April 30, 1945, during the entire period covered by the chart up to the date just

mentioned. It also shows that T. M. Schumacher, who was a director of the plaintiff corporation and holding various positions with the defendant corporation, was chairman of the executive committee of the defendant railroad company during this period starting in 1935 up to December 28, 1944.

(The document referred to was marked Plaintiff's Exhibit 25.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 26 four sheets identified as Interveners' 96, 97, 98 and 99, consisting of copies of the ballots of the James interests used in elections of the Western Pacific Railroad Company, the defendant company, at special meetings of the stockholders held on March 26, 1945; June 27, 1945; June 26, 1946, and June 25, 1947. The exhibits show that at the meeting of March 26, 1945, the [118] James Foundation of New York and the A. C. James Company, by Robert E. Coulson, cast a ballot of 134,738 shares of stock for the directors listed, which included Robert E. Coulson; that at the annual meeting of June 27, 1945, the James Foundation of New York and the A. C. James Company, acting by Robert E. Coulson, proxy, cast a vote for 134,738 shares of stock for the directors listed, including Robert E. Coulson; that at the meeting of June 26, 1946, the James Foundation of New York, by Robert E. Coulson, proxy, cast a vote of 208,892 shares of stock. That shows the additional shares which resulted from the conversion of the debt into common stock mentioned the other day

for the list of directors, including Robert E. Coulson; and, finally, at the meeting of June 25, 1947, the James Foundation of New York, by Robert E. Coulson, proxy, cast——

Mr. Adams: Mr. Phleger, will you read the names of the proxies, please?

Mr. Phleger: Excuse me. Robert E. Coulson and Stuart Jenkins, proxies for the James Foundation of New York, voted 208,892 shares of stock for the list of directors, including Robert E. Coulson and Stuart Jenkins.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 26.)

Mr. Phleger: I will next offer in evidence as Plaintiff's Exhibit 27 a document consisting of four sheets, otherwise identified as Interveners' 222-A, headed "The Western Pacific [119] Railroad Company, Statement Showing Funds Supplied by the Western Pacific Railroad Company to Mr. M. J. Curry, Assistant Treasurer, for Use in Meeting the Expenses of its New York Office," and a detail of expenditures made from such funds by Mr. Curry for the period March 15, 1943, to May 1, 1945. I call the Court's attention to the fact that our chronology shows that on June 1, 1943, all of the employees in the New York office were taken over as full-time employees of the trustees. This exhibit shows that there was paid during the period stated by the defendant railroad to Mr. Curry for the maintenance of that office and the payment of salaries the total sum of \$107,183.62. It also

contains the information which supports the showing of Plaintiff's Exhibit 2 of the receipt of compensation by those who occupied positions both with the corporation and with the company which are indicated by the red lines running to the company and the trustee. For example, Mr. Greer's salary which was paid by the company during this period to May 1, 1945, is shown as \$11,700 a year. Miss Valouch ranged from \$2,640 a year to \$2,860 a year; and Sheehan between \$1,980 to \$2,344 a year. All are shown by this exhibit to have been paid out of funds supplied by the defendant corporation to Mr. Curry as an officer——

Mr. Adams: I object to that statement, your Honor. The showing is that these funds came out of moneys in the hands of the court and were provided for the court's trustees. [120]

Mr. Phleger: I think the statement that I read——

The Court: I think I understand it. I do not need discussion.

Mr. Phleger: The title of the document is "Supplied by the Western Pacific Railroad Company." That supports the showing of the receipt of compensation shown on Plaintiff's Exhibit 2.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 27.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 28 a sheet also identified as Defendants' Exhibit 889, which is a one-sheet memorandum dated "San Francisco, June 2, 1943," with the initials

E. W. E., which I take it stand for Mr. Englebright, who is assistant to the president for the defendant company——

Mr. Adams: That is correct, and it is Mr. Engelbright's initial that appears below those typewritten initials.

Mr. Phleger: The document is headed "Memorandum for File Supplementing Information on the Memorandum of Conference Dated June 2, 1943, Relating to the Assumption of Certain Salaries and Expenses of the New York Office by the Trustees, the following details are of record:" and then in columns it shows the amount previously paid by the trustees, the amount previously paid by the W. P. Corporation, the total now to be paid by the trustees, that is, on a monthly [121] basis, and the annual total.

As the evidence will show, previous to this date of June 1 the employees shown on Plaintiff's Exhibit 2 were paid jointly by the corporation and by the company or trustees. After that date the entire compensation was taken over by the company or trustees and this exhibit shows the amounts paid previously by the two parties and the amounts thereafter paid by the defendant company or trustees, showing that that amount was the aggregate of the amounts previously paid by both parties. The employees listed are M. J. Curry, who was the president of the corporation; H. Brua Campbell, who was a member of the firm of Pierce & Greer, and Campbell was a director of the plaintiff corpora-

tion; Mary C. Valouch, who was a vice president, secretary and director of the corporation from May 1, 1945, and was secretary to Mr. Schumacher and assistant secretary of the company; John F. Wienken, who was the stenographer but who was a director and secretary of the plaintiff corporation; Lillian O'Neill, who was not a director or officer of the corporation but a telephone operator, and Catherine C. Sheehan.

Mr. Adams: Your Honor, I object to plaintiff's characterization of Mr. Wienken as a stenographer. There is nothing in the record to indicate that.

Mr. Phleger: We will show his functions and duties.

Mr. Clark: There very definitely is, your Honor; there [122] is direct testimony to the effect that Mr. Wienken is Mr. Curry's stenographer.

Mr. Phleger: We will later prove that, and it is shown in the depositions.

This exhibit further substantiates the statements contained on Plaintiff's Exhibit 2 as to the sources, amounts and duration of the compensation of the officers whose names are shown upon that chart.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 28.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 29 a sheet also identified as Interveners' Exhibit 373. It is one sheet of paper dated New York, January 27, 1943, signed by T. M. Schumacher, addressed to Mr. Curry. It reads: [123]

(The document referred to was received in evidence and marked Plaintiff's Exhibit 29.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 30 a memorandum consisting of two pages and a letter, which I will now describe, which are also identified as Interveners' 292 and Interveners' 4-A. The two-sheet memorandum is headed as [124] follows: "Memorandum of Conference June 2, 1943." It is signed by Charles Elsey, who is the president of the defendant railroad company. It reads as follows: [125]

* * *

I will next offer as Plaintiff's Exhibit 31 a document also identified as interveners' document 106, which consists of a letter dated November 9, 1943, addressed to Colonel Robert E. Coulson, 40 Wall Street, New York 5, New York, by Mr. F. C. Nicodemus, Jr., with a copy to Mr. T. M. Schumacher (reading):

"Dear Colonel Coulson:

"This will acknowledge receipt of your firm's letter of November 8, 1943, enclosing the report of the Reorganization Committee of the collection of officers and counsel and the designation of mailing address and adoption of by-laws.

"This also seems very formal and excessively regular but nevertheless I wish to write informally to congratulate the Reorganization Committee on the selection of your firm as its counsel. As counsel for the debtor as well as for the Western Pacific Railroad Corporation I stand ready to cooperate

to the fullest extent in expediting the reorganization.”

* * *

Mr. Adams: Would you read the last paragraph so that the [130] whole text may be there?

Mr. Phleger: (Reading.)

“At the risk of possible repetition of what I have said to you personally I think your firm will render a distinct service if it insists on the preparation of trust indentures of a somewhat different character than those that have been used in recent reorganization.”

* * *

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 31.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 32 a document also identified as interveners' document 316. It consists of a letter and also a telegram identified as interveners' 317. The first is a letter dated April 21, 1945, on the letterhead of the firm of Whitman, Ransom, Coulson and Goetz, signed by Robert Coulson and addressed to Mr. Charles Elsey, President of the Western Pacific Railroad Company: [131]

* * *

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 32A, and the telegram marked 32B.)

Mr. Phleger: I will next offer as Plaintiff's Exhibit 33 a letter also identified as interven-

ers' exhibit 38. It is a letter dated June 6, 1945, on the letterhead of Whitman, Ransom, Coulson and Goetz, 40 Wall Street, New York, signed by Robert E. Coulson and addressed to Mr. M. J. Curry, 10 Perth Ave., New Rochelle, New York (reading):

"Enclosed is the check of this firm for \$750 which represents a quarterly payment on your retainer by this firm for services in connection with the pending tax matters with which we are dealing in behalf of The Western Pacific Railroad Company. As agreed, this retainer is to be on an annual basis of \$3000 and this quarterly installment covers the period from May 1 to July 31, 1945.

"You will note that there are no deductions from this check on account of taxes or social security premiums since you are in no sense an employee of this office or The Western Pacific Railroad Company but are merely [137] retained as an independent contractor to make studies and reports and perhaps subsequently act as a witness in connection with the pending tax problem.

"Sincerely yours,

"ROBERT E. COULSON."

(The letter referred to above was received in evidence and marked Plaintiff's Exhibit 33.)

Mr. Phleger: I will now offer defendant's response to plaintiff's request No. 23. The request reads:

“For many years and till May 1, 1945, Miss Valouch was a clerk in the employ of the company. She received from the company compensation in 1943 of \$2500, in 1944 of \$2960, and in 1945 of \$953. On and after May 1, 1945, she became an employee of Coulson’s firm to assist them in their tax matters.”

The railroad defendant’s response is:

“Admit that Miss Valouch received compensation from the defendant, the Western Pacific Railroad Company, in the amount of \$953 in 1945, and on and after May 1, 1945, became an employee of the firm of Whitman, Ransom, Coulson and Goetz.”

The response of Western Realty is in substance the same. I will now offer as Plaintiff’s Exhibit 34A, B, and C, three documents which are respectively identified as interveners’ exhibits 404, 405, and 406. [138]

34A consists of a letter signed by Mr. M. J. Curry dated January 24, 1945, on the letterhead of the Western Pacific Railroad Company, 37 Wall Street, New York, New York, M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer, to the Western Pacific Railroad Company and to its Board of Directors (reading):

“Dear Sirs:

“I have been an officer of the Western Pacific Railroad Company (Vice-President, Assistant Secretary and Assistant Treasurer) as well as an officer of the Western Pacific Railroad Corporation, in New York, continuously since April 1, 1927.

“Having reached the age of 65 on September 30, 1944, I am desirous of retiring from the service upon the discontinuance and closing of this office and therefore submit this as my application for the granting to me of a pension.

“Yours very truly,

“M. J. CURRY.”

The next sheet, 34B, consists of a similar letter signed by T. M. Schumacher, similarly citing his retirement (reading):

“Dear Sirs:

“I have been chairman of the Executive Committee of the Western Pacific Railroad Company since July 1, 1926, as well as an officer of the Western Pacific [139] Railroad Corporation. From November, 1935, to January 1, 1945, I was one of the two reorganization trustees of your company. The reorganization of the Western Pacific Railroad Company was consummated on January 1, 1945, and my status as reorganization trustee was continued (by order of the United States District Court which appointed me) until May, 1945, for the purpose of preparing and filing a closing report of said trusteeship.

“Inasmuch as I have, as of February 1, 1943, resigned as an officer of the Western Pacific Railroad Corporation and it appears that my duties as trustee of the Western Pacific Railroad Company will be completed on May 1, 1945, it is my desire that I retire, as of that day, or as soon thereafter as

I am discharged as trustee by the court, and that this letter serve as my application for a pension, account chairman of the executive committee, retired.

“Yours very truly,

“T. M. SCHUMACHER.”

The third sheet, 34C, I do not need to read in full. It is a certified copy of a resolution of the Board of Directors of the Western Pacific Railroad Company held on January 26, 1945, granting the pensions as requested.

(Letters referred to above and resolution of Board of Directors were received in evidence and marked Plaintiff's [140] Exhibits 34A, 34B and 34C, respectively.)

Mr. Phleger: I will now offer in evidence defendant's response to plaintiff's request No. 28, which reads (reading):

“H. Brua Campbell——”

whom you will note on Plaintiff's Exhibit 2 is shown as a director of the corporation to for plant 1, plant 45, and also one of the attorneys for the company or trustees——

“——was and is an attorney and associate of Mr. F. C. Nicodemus of the law firm of Pierce & Greer.”

The response of the defendant railroad company (reading):

“Admit that H. Brua Campbell was an attorney, but upon the basis of the testimony of Mr. Frank C. Nicodemus, Jr., allege that he was a partner of

Mr. Frank C. Nicodemus, Jr., in the law firm of Pierce & Greer."

The response of Western Realty was substantially the same.

I will now offer in evidence defendant's response to plaintiff's request No. 29 (reading):

"Mr. Nicodemus, Jr., and his firm, Pierce & Greer, were counsel for the company for many years until January 1, 1945, and were New York counsel for Mr. Schumacher in his capacity as one of the reorganization trustees of the company. Pierce and Greer were also general counsel for the corporation."

The response of the defendant railroad company (reading):

"Deny request 29, except that admit that Pierce & Greer [141] were and are general counsel for the plaintiff."

The response of Western Realty is to the same effect.

I will now offer in evidence an admission on page 5 of the defendant's brief (reading):

"The holding corporation's Board of Directors met in New York and the holding corporation and the debtor had the same legal representation in New York."

I will now offer as plaintiff's exhibit 35, a document also identified as interveners' 286. It is a sheet dated May 28, 1945 (reading):

“Pierce & Greer and Frank C. Nicodemus, Jr.
40 Wall Street,
New York 5, New York.

“For allowance by order dated May 21, 1945, of the District Court of the United States, for the Northern District of California, Southern Division, in the matter of the Western Pacific Railroad Company, Debtor, No. 26591-S, as compensation for services rendered and for expenses incurred (including attorneys' fees) in connection with this proceeding, and the plan of reorganization confirmed therein, from November 1, 1939, to date of termination of these proceedings.

“Services, \$5,250.00.

“General, \$5,250.00.

“Pierce & Greer and Frank C. Nicodemus, Jr., \$5,250.00. Five thousand two hundred fifty 00/100.”

(Paper referred to above was received in evidence and marked Plaintiff's Exhibit 35.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 36 sheets identified as interveners' exhibits 281, 282, 283, 284, all as one exhibit.

The first sheet consists of a letter signed by Charles Elsey, dated “San Francisco, December 19, 1945.” It is addressed to Mr. C. W. Dooling and reads as follows (reading):

“Enclosed is a copy of a letter to me, dated New York, December 17, from Mr. F. C. Nicodemus, Jr., concerning fees to Pierce & Greer for services for our account during the year 1945.

“If this bill is satisfactory, will you please ap-

prove it and pass it to the auditor so that it may be included in December accounts?"

The amount of the last two bills is shown on Plaintiff's Exhibit 2, and included in the red lines running to "trustees" or "company."

The second sheet of the exhibit is a letter on the letterhead of Pierce & Greer, 40 Wall Street, New York 5, signed by F. C. Nicodemus, Jr., and dated December 17, 1945. It is addressed to Mr. Charles Elsey, President, the Western Pacific Railroad Company, 526 Mission Street, San Francisco 5, California (reading):

"Dear Mr. Elsey: [143]

"At the time of the consummation of the reorganization proceedings you asked our firm to continue handling the minor law matters and negotiations growing out of the carrier operations.

"You stated that the compensation would be on a mutually satisfactory, individual fee basis. We have allowed this to run along for approximately a year and I thought it opportune to send in a bill for the current calendar year. We do not think that there will be any further matters of substance to be handled during the remaining two weeks of the year, and I am sending the bill now for attention this year, which may be desirable from both of our standpoints.

"While it is difficult to appraise services of this nature, we are sending a bill in the amount of \$2,500 which seems to us reasonable for the services shown in the schedule thereto attached.

You will see from this schedule that Mr. Campbell devoted much time to these various matters.

“With kind personal regards,

“Yours very truly,

“F. C. NICODEMUS, JR.”

The third sheet is a bill or invoice dated December 17, 1945, for legal services from 1 January, 1945, to 31 December, 1945, in the amount of \$2,500. [144]

Mr. Phleger: The next sheet shows the receipt of payment of that bill.

Mr. Adams: The third sheet, Mr. Phleger, is neither a bill nor invoice but is a voucher for payment.

Mr. Phleger: A voucher for payment?

Mr. Adams: Yes.

Mr. Phleger: Thank you. The next sheet is the actual receipted bill with the O.K. of Mr. Dooling.

I will next offer in evidence the defendants' response to plaintiff's requests 35 and 36.

Request 35:

“Mr. Coulson and his firm were attorneys for James and his holding companies and are attorneys for the James Foundation and Coulson has always been one of its trustees.”

That is admitted by the defendants.

Request 36:

“During Mr. James' lifetime he and Coulson's firm on his behalf and after his death and until the decision of the United States Supreme Court on March 15, 1943, affirming the order of the Bankruptcy Court approving the plan, James Estate

and James Foundation and Mr. Coulson's firm on their behalf were active in opposing approval of the plan. The response of the [145] defendant Railroad Company admit Request No. 36 if that request refers to the modified plan of reorganization promulgated by the ICC."

The response of the Western Realty is to the same effect.

I will now offer in evidence as Plaintiff's Exhibit 37 a letter also identified as Defendants' Exhibit 864. This is a letter on the letterhead of Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York. The date is February 24, 1943. That date, I will direct the Court's attention to, is a date shortly before the Supreme Court approved the plan. It is signed by Robert E. Coulson, I. C., addressed to Mr. Charles Elsey, President of the Western Pacific Railroad Company, Mills Building, San Francisco.

"Dear Mr. Elsey:

"I am extremely anxious to receive as early as possible a copy of the Federal income tax return for 1942 of the Western Pacific Railroad Company together with sufficient of the working sheets to see how the tax was computed. No doubt I might obtain this in New York as I assume the question of a consolidated return has been considered and adopted or rejected. However, I also want to obtain figures which I have no doubt you have had made up as to what the Federal tax would be if the Commission plan had been in effect in 1942.

These [146] figures I could probably only obtain through your office, and I am therefore writing you directly for them. While the Supreme Court has delayed a long time in considering the questions presented to it, I am inclined to believe that a decision will come down next Monday.

“Sincerely yours,

“ROBERT E. COULSON.”

I will direct your attention to the fact that as of the date of this letter there was no official connection between Robert E. Coulson and the Western Pacific Railroad Company.

Mr. Adams: If the Court please, I take exception to that remark. His official position, of course, was one of representation which he had had with the reorganization for many years. Mr. Coulson appeared throughout the proceedings as the attorney for the A. C. James Co. in the reorganization proceeding, and like every other party to the proceedings he was entitled to ask Mr. Elsey, the trustees' agent, for information. That statement is out of order.

Mr. Phleger: I am not questioning his right, perhaps to request the information. I am pointing out a fact, which you cannot deny, that at this date he had no official connection either with the trustees in reorganization or with the Western Pacific Railroad Company.

Mr. Adams: I have stated the fact of record that he had [147] an official representation for a

party to the reorganization, the A. C. James Co., and had such for years. [148]

* * *

Mr. Phleger: I will now offer as Plaintiff's Exhibit 38-A a memorandum identified as Interveners' 51-A. I will offer as Plaintiff's Exhibit 38-B a letter identified as Interveners' 51-B and 51-C.

(The documents referred to were received in evidence and marked respectively Plaintiff's Exhibits 38-A and 38-B.)

Mr. Phleger: 38-A is a memorandum dated March 15, 1943, signed "R. E. C.," meaning Mr. Coulson. It is addressed "Memorandum for Mr. Polk." Mr Polk is a partner in the Ransom firm and handled the tax matters, as will be more fully developed by the evidence. This is the memorandum:

"I wish you would read the attached letter from Charles Elsey. It makes me wonder whether I ought not to insist on reviewing the consolidated tax return. Actually I happen to know that the only person in the corporation office over here in New York who has any knowledge of taxes is a girl who is primarily Schumacher's secretary. They probably have certified public accountants auditing the corporation books who are of some use to her, but I would be a little surprised if the [149] report were intelligently prepared. Either Elsey's letter is evasive or his organization in California

has done very little on the tax returns. Also I find it quite impossible to spell out from his letter what they have really done on depreciation. I would be glad to have your reaction on all this."

It is endorsed at the bottom of the letter in handwriting——

Mr. Adams: Mr. Polk's handwriting?

Mr. Clark: Concededly.

Mr. Phleger: Mr. Polk's handwriting, addressed to Colonel Coulson, is this statement:

"As I understand the procedure in the New York office, only the lady referred to had any part in the preparation of the return. She now has separate company data and will require several weeks to prepare consolidated schedules. She 'confers' with an accounting firm, but Mr. Curry says they are too impoverished to hire accounting help. They paid on March 15 a quarterly payment of \$1,000,-000. No decision has been reached as to depreciation treatment. I will follow this up if you so direct in about four weeks.

"J. K. P."

Up at the top in pencil is this: "J. K. P.: Better follow up. R. E. C." [150]

Exhibit 38-B, attached to 38-A, is a letter signed by Charles Elsey dated March 9, 1943, on the letterhead of the Western Pacific Railroad Company, San Francisco, California, addressed to Mr. Robert E. Coulson, care of Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York:

“Dear Mr. Coulson:

“This refers to your letter of February 24 making inquiry with respect to certain income tax matters. Income tax for the Western Pacific and its subsidiary companies is computed on the basis of a consolidated return by the Western Pacific Railroad Corporation. We do not compute the income taxes of the various companies separately. Under date of March 5, 1943, Mr. D. C. DeGraff, our general auditor, furnished Mr. Curry with all the required income tax data for the following companies: Western Pacific Railroad Company, Sacramento Northern, Tidewater Southern, Deep Creek, the Western Realty Company, Standard Realty and Development Co., the Delta Finance Company, Ltd. Using this data Mr. Curry is in a position to proceed with preparation of the consolidated return and you can obtain full information from him. As to the question of the second paragraph of your letter, I fear it must go unanswered, because no one knows at this time how or on [151] what basis the income tax of the reorganized company will be computed for the years 1939 to date. So far as we are aware, no waiver has been included covering the taxes for the year 1939, in which case the return already made would stand. Certain phases of the tax for 1942 would be dependent upon results of 1940 and 1941, and the whole subject is so full of uncertainties that we have ceased to make any attempt to compute taxes on the reorganized company basis. The forthcoming

decision of the Supreme Court could also change the entire picture."

Mr. Clark: Your Honor, may I ask Mr. Adams if he will concede that the lady referred to in Interveners' 51-A, which is now Plaintiff's Exhibit 38-A, was Miss Valouch?

Mr. Adams: I will agree with that inference, and I take it all counsel are agreed on that.

Mr. Clark: Thank you.

Mr. Phleger: I think it is apparent from the face of the document, particularly as it is in quotes.

I will now offer as Plaintiff's Exhibit 39-A, 39-B, 39-C, 39-D, 39-E and 39-F letters identified respectively as Interveners' 6, Interveners' 7, Interveners' 8, Defendants' 20, Defendants' 21 and Defendants' 23 and consisting of the following: These have to do, if your Honor please, with the employment of Mr. Coulson to handle the tax matter.

* * *

Mr. Adams: May I inquire, your Honor, with reference to the remark last made by Mr. Phleger, in which he referred to the engagement of Mr. Coulson as tax counsel, whether he had any purpose in distinguishing Mr. Coulson and his firm?

Mr. Phleger: No, I did not. I simply wanted to direct the attention of the Court to the significance of this exhibit, which shows the employment of Mr. Coulson and his firm as tax counsel.

Mr. Adams: The record will show the employment of the firm. I take it you have nothing in mind by way of distinguishing between Mr. Coulson and his firm?

Mr. Phleger: No, I have not.

I will now direct the Court's attention to Exhibits 39-A to -F, inclusive.

(Letter dated March 23, 1943, signed by T. M. Schumacher; letter dated March 23, 1943, signed by F. C. Nicodemus, Jr.; letter dated March 23, 1943, signed by F. C. Nicodemus, Jr.; letter dated April 7, 1943, signed by T. M. Schumacher; letter dated April 8, 1943, signed by F. C. Nicodemus, Jr., and letter dated April 20, 1943, signed by Robert E. Coulson, were received in evidence and marked Plaintiff's Exhibits 39-A to -F, inclusive.)

Mr. Phleger: 39-A is a letter on the letterhead of the Western Pacific Railroad Company, T. M. Schumacher and Sidney Mr. Ehrman, Trustees, signed by T. M. Schumacher and dated [153] March 23, 1943. I direct the Court's attention to the fact that that was a few days after the decision of the United States Supreme Court. It is addressed to Mr. F. C. Nicodemus, Jr., Pierce & Greer, 40 Wall Street, New York, New York:

"Dear Mr. Nicodemus:

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942.

"The return filed is a tentative one, an extension having been granted until May 15, 1943, to file a final return. As one of the Trustees of the Western

Pacific Railroad Company, I am looking to you to cooperate with Mr. Matthew, general counsel for the Trustees, in protecting the trust estate in the preparation of the final return."

39-B consists in Mr. Nicodemus' reply to that letter. It is dated March 23, 1943, the same date, addressed to Mr. T. M. Schumacher, Trustee, The Western Pacific Railroad Company, 37 Wall Street, New York, New York:

"Dear Mr. Schumacher:

"This will acknowledge your letter of today's date re income tax returns for 1942.

"The preparation of the final return involves many new and difficult questions arising under [154] the recent amendments to the Internal Revenue Code. These are essentially questions which I (and I am certain Mr. Matthew will feel the same way) would hesitate to determine without the advice of experienced tax experts who are in constant touch with the Treasury. I should assume that we would wish to have a number of conferences with the Bureau of Internal Revenue as to many phases of the new act before even reaching a decision upon the very critical question as to whether it should be a consolidated return or whether the trustees should make a separate return on behalf of the Railroad Company. This is but one of the many questions affecting very heavy present and potential tax liabilities to which we should give immediate attention.

"My suggestion is, therefore, that you authorize

me to arrange, if possible, for the services of Messrs. Whitman, Ransom, Coulson & Goetz, who are peculiarly well equipped to give the kind of expert advice that we will require and who are also very familiar with the problems of the Western Pacific Railroad Company. This employment is within the authority granted to the Trustees by the original orders made by Judge St. Sure.

“Very truly yours,

“F. C. NICODEMUS, JR.” [155]

Now, 39-C is a letter signed by Mr. Nicodemus on the letterhead of Pierce & Greer, dated March 23, 1943, addressed to Colonel Robert E. Coulson, Messrs. Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York City:

“Dear Colonel Coulson:

“Enclosed is a copy of a timely letter received this morning from Mr. Schumacher, together with my reply.”

This is obviously the two letters I have just read.

“If this arrangement is agreeable to you and your associates would you be willing to start right in without waiting for a confirmation from Mr. Ehrman. The time has been extended to May 15, 1943, but even this extended time is too short for adequate consideration of the questions which are certain to arise in this matter.

“My best regards to you.

“Very truly yours,

“F. C. NICODEMUS, JR.”

That is followed by 39-D, a letter from Mr. Schumacher, dated April 7, 1943, addressed to Messrs. Pierce & Greer, 40 Wall Street, New York, New York, attention Mr. F. C. Nicodemus, Jr. It is from T. M. Schumacher and Sidney M. Ehrman, Trustees, with copies to Mr. Sidney M. Ehrman, Mr. Charles Elsey and Mr. Allan P. Matthew:

“Dear Mr. Nicodemus: [156]

“Referring to your letter of March 23, 1943, in regard to our tax matters:

“Since receiving your letter, I talked the subject over on the telephone with Mr. Ehrman and wrote him on March 31 (copy to you) and, as you know, while Mr. Matthew was in New York recently I discussed it with him, at which time he stated he fully agreed with your recommendation to employ competent tax counsel for advisory services in connection with the preparation of final Federal tax returns for the calendar year 1942.

“Upon Mr. Matthew’s return to San Francisco, he conferred with Mr. Ehrman on the matter and, this morning, I am in receipt of a letter from him, dated April 5, 1943 (copy attached) in which he advises that the firm of Whitman, Ransom, Coulson & Goetz, which you recommended, is acceptable to Mr. Ehrman.

“As it is agreeable to me also, this will authorize you to arrange forthwith for the services of Whitman, Ransom, Coulson & Goetz, since the Federal returns must be filed on or before May 15, 1943.

“Yours very truly,

“T. M. SCHUMACHER.”

The next, 39-E, is a letter from Mr. Nicodemus to Colonel Robert E. Coulson dated April 8, 1943: "Dear Colonel Coulson:

"Referring to my recommendation to Messrs. Schumacher and Ehrman that your firm be engaged as advisory counsel to aid Mr. Matthew and me in the solution of the serious problems that will arise in connection with the preparation of final Federal tax returns for the calendar year 1942, I am just in receipt of advice from Mr. Schumacher that this recommendation in which Mr. Matthew has concurred is agreeable to the two Trustees and that they desire me to arrange forthwith for your firm's services.

"Since you already have advised me informally of your firm's willingness to undertake this work I write merely to confirm the arrangement and to say that I will hold myself in readiness to confer with your Mr. Polk and to make available to him such data as has been supplied to me and such further data as he may desire.

"The firm of Lybrand, Ross and Montgomery has been employed in connection with certain accounting problems and I understand their services will be available to us to the extent that we deem necessary."

The final letter of the series is 39-F, a letter on the letterhead of Whitman, Ransom, Coulson & Goetz, signed by Robert E. Coulson, dated April 20, 1943, and addressed to F. C. [158] Nicodemus, Jr., Esq., 40 Wall Street, New York, New York:

"Dear Mr. Nicodemus:

"This is a belated acknowledgment of your letter

of April 8, 1943. I had assumed from its text and from the fact that Mr. Polk and you were already at work when I received your letter that you needed no formal acknowledgment. However, it may be better, as a matter of record, that you should have a formal acknowledgment of the fact that we have undertaken the Federal tax work for the Trustees as advisory counsel in conjunction with yourself and Mr. Matthew.

“Sincerely yours,

“ROBERT E. COULSON.”

I will now offer in evidence the response of defendants to plaintiff's Request 38-A:

“Robert E. Coulson has been a director of the company ever since December 28, 1944.” That was admitted by the railroad company defendant and by the Western Realty.

Mr. Adams: Did that admission characterize the company as the reorganized company?

Mr. Phleger: No, it does not. The response reads——

Mr. Adams: The first one was the defendant, I take it?

Mr. Phleger: The first one reads: “Admit that Robert [159] E. Coulson has been a director of defendant, The Western Pacific Railroad Company, since December 28, 1944.”

Mr. MacKinnon: And the Western Realty admits that also, your Honor.

* * *

Mr. Phleger: Fine. I now offer in evidence Plaintiff's Exhibit 40, consisting of two pages, the

first offer identified as intervenor's exhibit 332 and the second sheet as intervenor's 335. The first sheet is headed "Statement of counsel fees paid to Whitman, Ransom, Coulson and Goetz by the Western Pacific Railroad Company and/or Reorganization Trustees of the Western Pacific Railroad Company during the period 1943-1947. Paid by the Reorganization Trustees of the Western Pacific Railroad Company, 1945, \$22,500 for services rendered in connection with federal tax matters for the years 1940-1944." Then under the heading, "The Western Pacific Railroad Company, the year 1945, \$85,000 for services rendered to the Reorganization Committee of the Western Pacific Railroad Company. Also for the same year \$21,075 for services rendered in connection with federal tax [169] matters for years 1940-1945, 1946, \$20,750. For services rendered in connection with federal tax matters for the years 1940-1946, 1947, \$20,500 for services rendered in federal tax matters for the years 1940-1947.

"Note: The James Foundation of New York, Inc., has made no payments to Whitman, Ransom, Coulson and Goetz for any services rendered by Whitman, Ransom, Coulson and Goetz to the reorganization trustees, the Western Pacific Railroad Corporation and/or the Western Pacific Railroad Company or any of its subsidiaries."

I might state that the matter which I have just read is the foundation of the showing upon Plaintiff's Exhibit 2 of the total paid Coulson and Goetz, Whitman, Ransom, Coulson and Goetz and James K. Polk of \$129,325.

Mr. Adams: If your Honor please, I would just like to note on the record, as I think it is appropriate, that we have objected on the score of immateriality and want of relevance to the offer of evidence as made, and that we may have an exception noted to your Honor's ruling in that regard and also in regard to the production of the documents, so that our position may be protected on the record.

The Court: And with the reservation, I think you should note, of the right to strike it at a later date.

Mr. Adams: Very well, your Honor.

The Court: So you make a note of that now and there may [170] be some other matters of this kind. I gather from what counsel says it is not so much the amount of these fees, it is the circumstance of payment being made here and for what.

Mr. Phleger: Yes. It seems to me it is a very important factor that the entire tax matters——

The Court: No, I am not arguing against your position in the matter. I am merely saying I take it the purpose of the introduction of this is not so much any question as to the amount of the fees but as to the nature of the services for which the fees were charged and the period covered.

Mr. Phleger: Correct.

The Court: I gathered that from what you said.

Mr. Phleger: That is correct.

Mr. MacKinnon: If your Honor please, may the record show a similar objection with respect to the rights of the Western Realty Company?

The Court: All right.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 40.)

The Court: Does that complete the exhibit?

Mr. Phleger: Attached to it is a second sheet, a letter addressed to James K. Polk, c/o Whitman, Ransom, Coulson and Goetz, 40 Wall Street, New York, dated December 19, 1946:

"Dear Mr. Polk:

"Pursuant to my telegram of this date I am inclosing [171] our voucher no 120186 in the grand total of \$24,318.93 for the services of yourself and associates in connection with this company's federal tax matters, including miscellaneous expenses incurred by you in the amount of \$3,568.93. In accordance with our exchange of telegrams on December 16, the voucher in question is made payable to you."—(that is to Polk) and not to the firm.

"Very truly yours,"

The original is signed Charles Elsey, copy to Mr. C. P. Russell.

Will it be stipulated, Mr. Adams, that the sums paid shown by this memorandum included the sums paid by the Coulson firm to Mr. Curry?

Mr. Adams: No, that is a mistake. You will have the whole record. That would be an incorrect statement.

Mr. Phleger: You do not stipulate?

Mr. Adams: Your statement is incorrect, Mr. Phleger.

Mr. Phleger: I asked you if you would stipulate.

Mr. Adams: We might as well deal with the facts instead of just stipulate about things that are not facts. That is all I have in mind.

* * *

Wednesday, February 2, 1949, 2 P.M.

Mr. Adams: If your Honor please, if I may interrupt Mr. Phleger a moment in his case, I would like to recount compliance with the direction of your Honor for the production of the documents referred to upon the close of the session this morning. Referring to Plaintiff's exhibit No. 40 introduced this morning, there has been handed to opposing counsel the original bills for 1945, the first item, for 1945, the third item, for 1946, and for 1947, and in addition to that, an additional bill that was received by the railroad company subsequent to the date of the exhibit. There has not been handed the opposing counsel a bill in the amount of \$85,000 as indicated upon Plaintiff's exhibit No. 40, for the year 1945, for the reason that no such bill was rendered, that payment having been made pursuant to an allowance in the bankruptcy court.

Mr. Phleger: May it please the Court, I would like to add to Plaintiff's Exhibit 40 as a third sheet, a sheet which I neglected to attach when the exhibit was first offered. That sheet is also indentified as intervener's exhibit 336 and is a reply to the letter which is already a part of Exhibit 40. You will remember that that letter was a letter from Mr. Elsey to Mr. Polk transmitting the voucher for \$24,000

for services the year 1946, and concludes: "In accordance with our exchange of telegrams of December 16, the voucher in question is made payable to you." [173] That is to Polk.

The document which I now refer to and offer as additional sheet on Plaintiff's Exhibit 40, on the letterhead of Whitman, Ransom, Coulson and Goetz, December 23, 1946, signed by James K. Polk and addressed to Mr. Elsey:

"This acknowledges your letter of December 19, 1946, inclosing a voucher check for the amount of the statement sent you covering the services of myself and my associates in connection with the company's federal tax matters. You may be somewhat puzzled why my suggestion was that this check be drawn to me instead of to the firm. You will remember that my original retainer in the tax matters was by the trustees under Section 77 at a time when Mr. Coulson was one of the Reorganization Committee. The retainer was a retainer personal to me rather than a firm retainer, and in view of the current flood of litigation in behalf of the holding company, it seemed better to continue the professional relationship as originally established.

"With all good wishes of the season, I am

"Sincerely,"

I will now offer as one exhibit, being Plaintiff's Exhibit 41, the bills that have been furnished us by counsel in response to our request and which have just been mentioned by him as follows: The bills are four in number and I will tie them to [174]

Plaintiff's Exhibit 40. The first item, which is reported in the year 1945, \$22,500, as being paid by the reorganization trustees, is the first item of the exhibit. It is dated March 31, 1945, and is rendered in the name of James K. Polk, "To James K. Polk, c/o Whitman, Ransom, Coulson and Goetz." That is the first item shown on that exhibit.

The second item, skipping over the \$85,000 item just mentioned by counsel, is the bill for the year 1945. That is dated December 20, 1945, and is rendered to the Western Pacific Railroad Company. That is after the company came out of reorganization a year and covers professional services rendered during that calendar year.

Mr. Clark: In what amount, Mr. Phleger, please?

Mr. Phleger: \$21,075.

The next item is the bill for 1946, \$20,750, which is a bill rendered under date of December 13, 1946, to the Western Pacific Railroad Company by James K. Polk, c/o Whitman, Ransom, Coulson and Goetz.

The last item is that for 1947, of \$20,500 covered by a bill dated December 19, 1947, rendered to the Western Pacific Railroad Company, not by Polk, but to Whitman, Ransom, Coulson and Goetz. I ask that these be received and marked Plaintiff's Exhibit 41. I would prefer them as one exhibit.

* * *

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 41.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 42 a further bill which has been produced in response to the plaintiff's demand and which is not covered by Exhibit 40. I will read it. It is dated November 15, 1948. It is rendered to the Western Pacific Railroad Company by Whitman, Ransom, Coulson and Goetz. The statement is: "Final Statement covering professional services in connection with federal tax disputes as to the taxable period from January 1, 1942, through April 30, 1944." That is the period covered by the tax returns which are the subject matter of this litigation, and the amount of the charge is \$300,000. In addition to the \$300,000 charge for services is this item:

"Retainer payments, July 1, 1945, to December 31, 1948, to M. J. Curry, the President of plaintiff corporation, \$10,500, making a total of \$310,500."

Mr. Adams: If your Honor please, I would object to so much of counsel's statement with regard to this matter as this bill is not one mentioned in the exhibit which your Honor saw this morning, it being a patent fact that the exhibit was furnished to opposing counsel at a time long prior to the receipt of this bill. This bill has now been furnished to counsel, only recently received by the company, even though not requested [176] within the scope of the morning's request. Counsel has had the full information. I think it is wholly out of keeping for the imputation to be suggested that anything at any time has ever been withheld from opposing counsel with respect to the facts of this case.

Mr. Phleger: There is no suggestion and was none, Mr. Adams, on my part. I think you are taking something for granted that was not at all in my mind.

Mr. Adams: I am glad of that.

Mr. Phleger: It is perfectly obvious it was not included and I did not intend in the slightest way to suggest that it was covered by that statement. But it was covered by our demand.

Mr. Adams: I think that is also correct, and it has been produced.

Mr. Phleger: Correct. I will now offer in evidence the defendant's response to plaintiff's request 41A. Request 41A is:

"The Coulson firm was tax counsel for the corporation with respect to taxes for 1942, 1943, and the first four months of 1944, and served as such until August 1947." The response of the defendant railroad company is:

"Deny, except that they admit that Whitman, Ransom, Coulson and Goetz were employed by the reorganization trustees, namely, Thomas M. Schumacher and Sidney Ehrman, as tax counsel in connection with the federal tax return filed for the affiliated [177] group of corporations of which plaintiff was one for the year 1942-1943 and the first four months of 1944, and that Whitman, Ransom, Coulson and Goetz later employed by defendant, Western Pacific Railroad Company, as tax counsel, and that they continued to act as tax counsel for the affiliated group to and including August, 1947."

The response of the Western Realty Company is in substance the same.

Mr. MacKinnon: I think there is some change.

Mr. Phleger: Would you like me to read it?

Mr. MacKinnon: If you will, please.

Mr. Phleger: The Western Realty response is:

“Admits that Whitman, Ransom, Coulson and Goetz were employed as tax counsel by the reorganization trustees of the debtor in reorganization in connection with the federal tax returns filed for the affiliated group of corporations, of which plaintiff is one, for the years 1942, 1943 and the first four months of 1944, and that Whitman, Ransom, Coulson and Goetz were later employed by defendant as tax counsel when the assets and properties of the reorganization trustees became vested in defendant, and that Whitman, Ransom, Coulson and Goetz continued to act as tax counsel for the affiliated group of corporations in connection with the federal tax returns filed for the years 1942, 1943, and the first four months of 1944 to [178] August of 1947.”

(The document previously referred to was received in evidence and marked Plaintiff's Exhibit No. 42.)

Mr. Phleger: Before passing on to the next exhibit I would like to demand of counsel for the defendant the letter, if any, which accompanied the bill which I have just introduced in evidence.

I will next offer in evidence as Plaintiff's exhibit 43 an exhibit consisting of two letters on the same subject, which I will offer as one exhibit. The first

letter is identified as defendant's exhibit 448 and the second as defendant's exhibit 449. The first letter is on the letterhead of the Coulson firm, under date of July 25, 1944, and signed in the firm name and addressed to M. J. Curry, President of the Western Pacific Railroad Corporation, 37 Wall Street.

"Dear Mr. Curry:

"We have given the matter of adoption of declared value on the 1944 capital stock tax return for the Western Pacific Railroad Corporation consideration, after discussing with Miss Valouch and Mr. Reilly the present estimates of declared value excess profits tax net income for the calendar year 1944."

I do not think it is necessary to read the entire letter, but to call the Court's attention to a paragraph which states that the "best judgment of the company officers and employees would seem to be that there will be no declared value excess [179] profits tax net income derived by the corporation in the calendar year 1944. Accordingly it is believed that the capital stock tax return may properly reflect the declared valuation of zero for the Western Pacific Railroad Corporation."

I do not think there is anything else in the letter that is important.

The attached letter is signed by M. J. Curry, dated July 26, 1944, addressed to Mr. D. C. DeGraff, general auditor, the Western Pacific Railroad Company, in San Francisco; copies to Mr. James K. Polk, Mr. Frank C. Nicodemus.

“Dear Mr. DeGraff:

“After receiving copies of the 1944 returns of the capital stock tax which were inclosed with your letter of July 21, they were delivered to our tax counsel, Mr. James K. Polk of Whitman, Ransom, Coulson and Goetz for his review, having previously submitted to him for consideration the question of the capital stock returns. I am in receipt of a reply from his firm, copy of which I am inclosing for your information.”

Mr. Adams: There is a further paragraph in that letter.

Mr. Phleger: Do you wish me to read it?

Mr. Adams: If you please.

Mr. Phleger: “I am also inclosing 1944 return of capital stock tax for the Western Pacific Railroad Company and statement of the trustees, both executed by [180] Mr. T. M. Schumacher as trustee. We would appreciate it if you will send us conformed copies of all the returns filed for our records.”

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit 43.)

Mr. Phleger: I next offer as Plaintiff's Exhibit 44 a sheaf of documents otherwise exhibited as intervenor's 213A, 213B and following to and including 213Z and 213AA, all dealing with the same subject. The top sheet of the exhibit is a typewritten memorandum dated July 26, 1944, addressed to Mr. Polk

and signed by the initials M.C.V., which I take it, counsel, you will stipulate as Miss Valouch?

Mr. Adams: Mary C. Valouch.

Mr. Phleger: "Herewith for your approval are proposed journal entries made up by Mr. Worden of Lybrand, Ross Bros. and Montgomery, who is entering the corporation books as of June 30, 1944."

In pencil is "M.C.V." At the bottom is the following:

"Returned July 27, with inked corrections, Mr. Polk stating that Mr. Coulson, Mr. Whiteside and he had approved with corrections noted."

I do not think that it is necessary to go through this exhibit except to point out that this exhibit has to do with the book entries on the corporation's books of the stock loss, which was the loss taken advantage of or used in the consolidated returns that produced this tax result.

Mr. Adams: May I object to the characterization again, your Honor? The documents will speak for themselves and are quite elaborate and, to my way of thinking, prove other matters besides the particular purpose which counsel has indicated was his purpose. I do not want to interfere too much with his presentation, but I suggest that when it comes to documents, counsel's characterization of the documents is going to be subject to dispute, and if we can have as little of that as possible, we will have a record with fewer interruptions.

Mr. Phleger: I am trying to save time, if the Court please, and I suggested it to counsel that if

by inadvertence or otherwise I omit something of importance, I wish he would call it to my attention.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 44.)

Mr. Phleger: The attached journal entries show the correction in ink which is mentioned by Miss Valouch's memorandum as being corrections by Mr. Polk:

"12-31-43, loss as result of reorganization of subsidiary's capital stock the Western Pacific Railroad Company \$75,796,400."

Mr. Adams: Are you reading the first page?

Mr. Phleger: Yes, 213B.

I direct your attention also to a written memorandum [182] identified as intervener's 213K on yellow paper, signed M.C.V., dated July 26, addressed to Mr. Worden:

"Our lawyers feel that the tax should reflect the sale of collateral securities when they were sold in 1943, and was corporation property until date of sale. The balance of collateral unsold in 1944 was turned over to the creditors as of the date of the stockholder's meeting April 20, 1944, when the agreement with the three creditors was approved. The stock of the Western Pacific Railroad Company should be written down to \$1 as of the date of the Supreme Court decision approving the I.C.C. plan of reorganization."

That is this date (indicating on chart).

“Wherein the stock is declared worthless.” That date is March 15, 1943.

“A journal entry should be made to reflect that this stock, although worthless, is shown at \$1 to indicate that legal title to the stock was still held by the Western Pacific Corporation. Counsel would like to hear what journal entry is before entered in books (over phone) when the transfer was made of this stock to the reorganization committee on May 1, 1944.

“The dollar is written off, the advances to the Western Pacific Railroad Company are to be written off as of the Supreme Court decision on the W.P.R.R. Co. plan of reorganization [183] March 15, 1943, which states that unsecured claims are to be cancelled, Western Realty Stock, of course, to be treated as other collateral property of James Foundation of New York as of stockholders’ meeting dated April 30, 1944. The question of turning back the Standard Realty and Sacramento Northern advances (accommodation collateral) is on appeal with the Circuit Court of Appeals and should remain on books until order is issued.”

That shows the treatment of the loss. The loss was written off on March 15, 1943, as of the date of the reorganization, but the title to the stock was carried in the parent corporation until April 30 of the following year, during all of which period the technical affiliation continued which permitted, of course, the filing of the consolidated returns for that period. [184]

I will now offer as Plaintiff's Exhibit No. 45 four sheets otherwise identified as intervenor's 226, 225-A, 225B and 225C. The first sheet is a telegram from M. J. Curry to Robert E. Coulson in San Francisco dated March 26, 1945, and reading as follows:

"Delaware Tax Board has granted extension to July 1, for payment delinquent franchise tax. Have up with Mr. Polk question preparation petition for redetermination franchise taxes for 42 and 43, which must be filed by March 29."

Those, if your Honor please, are franchise taxes of the parent corporation, no one else. The subsidiary corporations have no interest in those.

The second sheet consists of a letter on the letterhead of the Coulson firm, signed by J. B. Robinson, who is one of the partners of that firm, as shown by the letterhead, dated March 27, 1945, and addressed to M. J. Curry, Vice President of the Western Pacific Railroad Company, not the corporation, 37 Wall Street:

"Dear Mr. Curry:

"Pursuant to your letter to Mr. Polk of March 23, 1945, I have prepared and enclose herewith a petition for commutation of franchise tax in respect of the Delaware franchise tax of your corporation for the calendar years 1942 and 1943. The annual reports, financial statement and correspondence which Miss Valouch furnished me in this connection are returned herewith."

The last two sheets are copies of the petition for commutation of franchise tax of the State of Dela-

ware, of the [186] Western Pacific Railroad Corporation, referred to in the previous letter. I will read the last two paragraphs of the last page. This is the rider to the petition:

“In support of this appeal, reference is made to petitioner’s letter of March 27, 1943, addressed to the State of Delaware, State Tax Department, 843 King Street, Wilmington, Delaware, which contained a detailed statement regarding the bankruptcy of the two railroads, securities of which constituted practically the entire assets of the petitioner.

“On the basis of this letter, the State Tax Board, under date of April 9, 1943, granted the one-half tax rate for the years 1940 and 1941, and reduced statutory interests from 12% to 4% per annum.

“There has been no improvement in the financial condition of the petitioner since the foregoing letter. On the contrary, the reorganization of the Western Pacific Railroad Company, one of the two railroads referred to above, has now been completed. The petitioner now has no securities of any kind in this railroad except a nominal amount of common stock issued in the reorganization, having a value of less than \$300.

The petitioner at all times since the bankruptcy of said two railroad companies has been inactive and unable to carry on its normal functions.”

That is the language of the petition prepared by the Coulson firm for the plaintiff corporation.

The Court: Now, what do you suppose they meant by that?

Mr. Phleger: They meant that the plaintiff corporation——

The Court: Or is that just an argument that counsel made?

Mr. Phleger: No, I think it was a very fair statement. I think the plaintiff was in a state of corporate coma.

The Court: Well, he said they were unable to act. I don't know what that means.

Mr. Phleger: The last two sentences there make it clear that it is unable to carry on its normal functions.

The Court: Well, I might say that that comes to me like an argument that attorneys make to get the tax changed.

Mr. Phleger: That may be.

(The documents referred to were received in evidence and marked Plaintiff's Exhibit 45.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 46 the minutes of the Western Pacific Railroad Corporation, which are otherwise identified as Intervenors' 253.

(The minutes referred to were received in evidence and marked Plaintiff's Exhibit 46.)

Mr. Phleger: I will only read two paragraphs from this, because I don't think that the balance is important.

(Exhibit 46 examined by Mr. Adams.) [188]

Mr. Phleger: The following appears in those minutes, and these are the minutes of the meeting on July 31, 1945, of the corporation:

“The Chairman reported that on advice of Whittman, Ransom, Coulson & Goetz, Tax Counsel, the corporation declared a zero value on its 1945 capital stock tax return for the year ended June 30, 1945, and that he, as President, had executed and filed such return with the Collector of Internal Revenue at Wilmington, Delaware; on motion duly made and seconded, the action of the President in filing the declaration recommended by Tax Counsel be and the same is hereby approved.”

Mr. Clark: Mr. Phleger, may we have indicated the persons present at that meeting?

Mr. Phleger: There were present at that meeting the following directors: M. J. Curry, W. W. Hatton, A. Perry Osborn, T. M. Schumacher, M. C. Valouch, John F. Wienken, Willis D. Wood, constituting a quorum. Also present were Mr. F. C. Nicodemus, Jr., of counsel; Miss M. C. Valouch acted as secretary.

Mr. Adams: Occasionally reference is made to “Mr. Nicodemus, Jr.” and then occasionally without the “Jr.”; but may it appear it is the same gentleman at all times that you have reference to?

Mr. Phleger: Yes. [189]

Mr. Clark: In spite of his various capacities.

Mr. Phleger: It is so stipulated.

May it please the Court, I would now like to offer in evidence Plaintiff's Exhibits 1 and 2, all the

material on them having been shown by other evidence.

The Court: Well, they are only for illustrative purposes?

Mr. Phleger: Correct.

Mr. Adams: In this state of the record, I would have several objections to make to the receipt in evidence of these documents, and I suggest that they may remain until a later date and we can fully develop whatever inaccuracies there may be, as we believe there are. Or perhaps you may be able to establish to his Honor's satisfaction that they are not inaccurate in the respects that we may suggest.

Mr. Phleger: Well, of course, as your Honor pointed out, they are for illustrative purposes only, and for convenience. They are not binding on you as separate evidence. I think it would be a convenience at this time to put them in, because we would like to reproduce them.

Mr. MacKinnon: Well, your Honor, my position is that the documents have not been established, and until they are established, I don't think they are properly received; and I think as the evidence unfolds it will be demonstrated that they are not accurate.

Mr. Clark: Well, your Honor, may they be received simply [190] for the purpose of illustrating the evidence which has thus far been admitted, without any probative effect?

Mr. MacKinnon: I think even then, your Honor, until they are properly qualified as competent and relevant——

Mr. Phleger: Well, let's argue that out now, then, gentlemen.

Mr. Clark: Well, the proposition is, they have been authenticated and qualified.

Mr. Phleger: We have covered every single item on that. He may dispute our evidence, but the fact is that our evidence supports every single item on those charts. They have no probative effect. The evidence itself is the evidence, but we think we are entitled to introduce those two exhibits as illustrative.

The Court: Well, you mean really that they are a summary of what you have brought forth?

Mr. Clark: That's right, without any simple probity to the fact, except the evidence that supports them and is already in—simply as a convenience to the Court and counsel and all parties.

The Court: Well, of course you don't really need them in evidence. They are here, and as you say, it is a summary. If it isn't correct, if it isn't a correct summary, the other side will correct you in it. I don't know that it adds anything particularly to the record to introduce it in evidence. [191] I will consider that counsel wants the Court to look at it as a summary and if they do want me to look at it as a summary, I will do so. If the other side says it isn't correct, they can correct it. I don't know how it adds to the record, in any way. But it is here and the record will show that the Court now has in front of it these charts as a summary of the evidence, the Court has been looking at it, my atten-

tion has been called to it by counsel, and I will continue to look at it; and counsel on the other side can point out any respect in which it is inaccurate.

Doesn't that take care of it?

Mr. Phleger: I take it also that having been identified, that this would go along with the record in this case for the purposes which your Honor has just stated?

The Court: Yes, it would be a part of the record. I guess that might be said to be correct.

Mr. Clark: Well, that was my only point of suggesting that, your Honor.

The Court: It would be not necessarily as proof of any fact therein stated.

Mr. Phleger: That's right.

Mr. Adams: This is marked for identification, so it may well be considered that they have been marked for identification as the documents to which plaintiff's counsel have from time to time addressed themselves. [192]

The Court: Well, do you think that there is some inaccuracy there?

Mr. Adams: Oh, yes, your Honor. I expect, when we get our time to talk, that we will be wanting to point out things that are inaccurate in that presentation.

The Court: I suspect what you mean is that they are inaccurate because they draw conclusions you do not from the evidence?

Mr. Adams: And I think what our purpose will be, will be to indicate that there are material re-

spects in which those documents are missing something that should be there in order for a fair statement to be in the record.

The Court: You mean certain people there were not occupying positions at the times stated?

Mr. Clark: I don't think Mr. Adams could make any contention such as that, your Honor; I think it has something to do with the railroad defendants' interpretation of these very positions. I think factually there is no doubt but what these charts are accurate. I don't think that will be disputed.

Mr. Adams: I don't want to take up the Court's time at this time, beyond suggesting that I do think I am going to find fault with those presentations.

The Court: I will reserve ruling on admitting this in evidence, and you can fight it out later on.

Mr. Phleger: I will now offer in evidence as Plaintiff's [193] Exhibit 47 minutes of the board of directors, of the corporation itself, meeting on Tuesday, March 23, 1943. That meeting, as you will note by reference to our chart, was shortly after the decision of the United States Supreme Court upholding the reorganization as proposed by the ICC.

(Minutes dated March 23, 1943, referred to were received in evidence and marked Plaintiff's Exhibit 47.)

M. Phleger: I will only read the portions that appear to me to be pertinent.

Mr. MacKinnon: Will you describe the date of the minutes?

Mr. Phleger: Yes. March 23, 1943, and the document is otherwise identified as Interveners' 194.

Mr. Clark: The other markings are from the New York litigation, I think—the plaintiff's.

Mr. Phleger: I read from the fourth page:

“Counsel for the Corporation was requested by the Chairman to report upon the decision of the United States Supreme Court handed down on March 15, 1943, in the Western Pacific Railroad Company reorganization proceedings, reversing the judgment of the Circuit Court of Appeals and affirming the order of the District Court which had approved the plan of reorganization certified to it by the Interstate Commerce Commission. In [194] outlining the scope of the decision, counsel pointed out that the Supreme Court had approved the finding of the Commission that unsecured indebtedness, as well as the capital stock of the railroad company, was without value, and expressed the belief that a motion for reargument would be fruitless, inasmuch as the Court had not overlooked any substantial question involved in the case, but had passed upon all such questions. The effect of this decision upon the corporation's future was considered by the Board, and counsel submitted a draft of the proposed communication to the corporation's three principal creditors, advising them of said decision of the Supreme Court and inquiring whether it was their desire that the corporate status of the corporation should be preserved, or that the corporation be liquidated immediately and without judicial proceedings, and whether they are pre-

pared to advance the funds necessary to preserve the corporate status or liquidate the corporation.

“Whereupon, after full discussion, the President was directed to forward to said three principal creditors a communication in substantially the form submitted to the meeting, and a copy of said communication was ordered to be annexed to and made a [195] part of the minutes of this meeting.”

The attached copy of the letter is on the letter-head of the Western Pacific Railroad Corporation, dated March 23, 1943, and signed by M. J. Curry. It is addressed to Mr. William W. Carman, and the United States Trust Company, Executors of the Estate of Arthur Curtis James; the Chase National Bank; Central Hanover Bank and Trust Company:

“Dear Sirs:

“Each of you is a creditor of this corporation as of January 1, 1943, in the amounts shown in the schedule set out below, except as your claim may have been reduced by application of the proceeds of sale of certain of the collateral.”

And then there is the schedule of the indebtedness.

“On March 15, 1943, the United States Supreme Court released the opinion in the proceedings for the reorganization of the Western Pacific Railroad Company and the companion proceeding for the reorganization of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, in which it held that the capital stock of each of these two com-

panies had properly been declared to be worthless by the Interstate Commerce Commission, and that the action in each case of the District Court in affirming the finding so made by the Interstate Commerce [196] Commission was correct.

“At the expiration of 25 days from the date of the decision, a mandate will issue to the District Court directing it to take further proceedings consistent with the decision of the United States Supreme Court.

“The only asset of this corporation which could be utilized to further collateralize your loans is 283,000 shares of preferred stock and 475,000 shares of common stock of the Western Pacific Railroad Company, held unpledged in the treasury of the corporation. The common stock has been delisted by the New York Stock Exchange, but trading continues on the exchange in the preferred stock, and from day to day certificates in substantial amounts are presented for transfer into the names of purchasers.

“The corporation is without funds to continue its corporate existence, and the Board of Directors has directed the undersigned to communicate with you with a view of obtaining the following information: 1. Do you desire the corporate status of the corporation to be preserved, or do you desire to have the corporation liquidated immediately and without judicial proceeding? 2. Are you prepared to advance the funds necessary to preserve the corporate status or liquidate the corporation?

“Your prompt advice in the premises will be greatly appreciated.

“Very truly yours,

“M. J. CURRY.”

Mr. Adams: I suggest it be stated, and I think all counsel would agree, that in the paragraph which refers to the only asset of the corporation as certain shares of preferred stock and certain shares of common stock of the Western Pacific Railroad Company, that that reference is as stated to the railroad company's stock. The next paragraph, which refers to the statement, “the common stock has been delisted, but trading continues on the exchange in the preferred stock,” I understand to refer to the common stock and the preferred stock of the holding company.

Mr. Clark: That is correct.

Mr. Phleger: It will be so stipulated.

Mr. Adams: Counsel, do you desire to read the last few lines? I interrupted you. The last few lines in the minutes, which follow after the letter which you had just read into the record.

Mr. Phleger: Well, I don't think they are of any importance, but I will be glad to do so if you wish.

Mr. Adams: They are relevant to your presentation.

Mr. Phleger: Well, they are part of the sentence: “Upon [198] motion duly made, seconded and carried, the meeting was adjourned, to be re-

convened upon receipt of reply from said creditors to the aforementioned communication.”

And then it is signed by John F. Wienken, Secretary, and approved by M. J. Curry, Chairman.

Mr. Adams: Would you read into the record, please, the names of the persons present at that meeting of the board of directors of the parent company?

Mr. Phleger: Those present were directors Campbell, Curry, Hatton, Osborn, Schumacher, Wienken, Wood,—by the way, their names are shown on Plaintiff’s Exhibit 2—constituting a quorum. Mr. Nicodemus, Jr. of counsel was also present.

I will now read an admission from defendants’ brief, page 4:

“Its”—meaning the corporation’s—“only other substantial asset was a one-half interest in the stock of the Denver Rio Grande and Western Railroad. The holding company’s only remaining substantial asset, its stock interest in the Denver Rio Grande and Western Railroad, was also subsequently determined to be without value in reorganization before the ICC.”

That last was from pages 8 and 9 of the brief.

I now offer as Plaintiff’s Exhibit 49, otherwise identified [199] as Interveners’ Exhibit 10, a letter on the letterhead of the Coluson firm, signed by Robert E. Coulson, dated April 12, 1943, addressed to M. J. Curry, President, the Western Pacific Railroad Corporation; in reply to the form of letter which I have just read:

“Dear Sir:

“On behalf of the executors of the estate of the late Arthur Curtiss James, we are instructed to advise you in reply to your letter of March 23, 1943, that the claim of the Curtiss Southerwestern Company against your corporation, which was one of the assets held by the executors, has been transferred to the James Foundation of New York, Incorporated, as residuary legatee under the will of Arthur Curtiss James. We are further instructed to advise you on behalf of the James Foundation of New York, Inc., that the trustees of the Foundation do not feel justified in authorizing any advance from the Foundation to your corporation for the preservation of the corporate existence of your corporation.

“The trustees of the Foundation would, however, be prepared to consider any specific proposal that was made on behalf of your corporation to facilitate its prompt liquidation by the release [200] of any deficiency claim against your corporation, in consideration of the surrender by your corporation of any rights which it might have in the collateral held by the Foundation.

“If there were included in any such proposal a participation by the Foundation in the payment of any necessary State tax charges involved in the dissolution of your corporation, this element would be considered by the trustees of the Foundation as a part of the general proposal. Any such proposal, however, would need to state specifically and accu-

rately the amount of payment by the Foundation which was contemplated.”

Mr. Clark: That is Plaintiff’s 48, Mr. Phleger.

The Clerk: You stated it was 49.

Mr. Phleger: 48 was correct. I am sorry.

(The letter dated April 12, 1943, referred to above, was received in evidence and marked Plaintiff’s Exhibit 48.)

Mr. Phleger: I will now offer as Plaintiff’s Exhibit 49 a letter otherwise identified as Defendants’ No. 67, on the letterhead of the Coulson firm, signed by Robert E. Coulson, dated May 1, 1943; subject: Western Pacific. It is addressed to F. C. Nicodemus, Jr., Pierce & Greer, New York:

“Dear Mr. Nicodemus:

“This morning I received your letter under date of April 30, enclosing a copy of a proposed petition, which I understand you are filing Monday with the District Court in San Francisco.

“It does not seem to me that your petition will serve any useful purpose, and I assume that you are filing it under what you deem to be, as set out in your petition, your statutory duty of representing all interested parties throughout the proceeding.

“Your petition presents an interesting divergence in your prayers for relief, in that in behalf of the equity you are asking for a reopening of the proceeding, and in behalf of certain bondholders not previously represented, you are asking an immediate confirmation of the Commission plan.

“At a meeting last Thursday of the insurance group with the three junior creditor groups, it was definitely decided to abandon any effort to modify the Commission plan and to work wholeheartedly for a prompt consummation of the plan. This necessarily involved a withdrawal of the petition previously filed by those parties with the District Court asking deferment of certification.

“It is my impression that Judge St. Sure is likely to deny your petition promptly.”

The date of that letter is May 1, 1943, which is a month [202] and a half after the Supreme Court decision.

(The letter of May 1, 1943, referred to above, was received in evidence and marked Plaintiff's Exhibit 49.)

The Court: What was the petition?

Mr. Phleger: That was a petition for rehearing.

The Court: I mean, on the general ground that some equity should still be allowed the plaintiff?

Mr. Adams: No, your Honor. We might as well get the record straight about this. There was no such petition ever filed. That is one thing that is apparent from the record. Another thing is that there was a petition filed by the senior creditor group, to which reference is made in the letter just read. I think if documents of this sort are going to be produced, it would be well to have them tied into the part of the record to which they refer and have clarity when it comes to statements which are not a part of the record.

Mr. Phleger: Well, now, just a moment. The reference in this letter is to a petition by Mr. Nicodemus, and the fact is that Mr. Nicodemus' petition to the District Court was for the purpose of inducing the Court to give some recognition to the equity.

Mr. Adams: The petition was never filed.

Mr. Clark: It was never filed.

Mr. Phleger: I know, but that was the purpose, even though the petition was not filed. [203]

Mr. Adams: Well, let's have the record clear that that petition was a draft petition which was never filed.

Mr. Phleger: That's right, but it was for that purpose, was it not?

Mr. Adams: Let's have the petition speak for itself.

Mr. Phleger: Can't you stipulate that that is what it was?

Mr. Adams: I am very much more interested in having the true facts before your Honor. If there is going to be a discussion about this matter, it can be shortened a great deal if the thing itself is proven.

The Court: Well, all I want to find out is what the petition was. It was a proposed petition which was not filed, in which some relief was being asked?

Mr. Clark: Correct. It was a proposed petition which was sent out here for filing, but on further consideration was not filed, seeking to defer certification, or in other words, reopen the proceeding

for the purpose of getting a higher valuation on the properties than the ICC had placed on them in 1939. In general, your Honor, it was a petition seeking relief for the holding corporation from the standpoint of possibly getting it some equity in the debt.

Mr. Adams: Granting to all counsel, as I do, of course, complete candor,—and the purpose I have is to be completely candid in regard to this—we are going to have trouble, [204] regardless of our own statement, for matters that are readily open to proof by precise documents. Now, in this case, it may be that it will be unnecessary to discuss this petition further. But if it should be necessary, if other counsel then do not bring the facts to your Honor, we will do so.

The Court: Of what importance is this, anyhow?

Mr. Adams: That I don't understand myself, but counsel brought it in.

The Court: Just what has this got to do with the case?

Mr. Phleger: You mean the contents?

The Court: Well, the letter, the petition; the Coulson firm writes a letter to Nicodemus. What do I care about that in deciding whether or not the holding company has got some rights?

Mr. Phleger: It is submitted as proof, your Honor, of the thing that I think is very important, and that is that shortly after the Supreme Court decision, the parent corporation was without funds and was in a state of corporate coma, and that Mr.

Coulson, who represented the largest creditor or one of the largest creditors, who had previously been active in supporting a claim for an equity for the parent corporation, advised Mr. Nicodemus that he would make no further effort, but would use his efforts for the prompt consummation of the plan of reorganization. And the probative effect of it is that it became hopeless at that moment for the parent [205] company to attempt to further claim an equity, because the principal creditors who had previously backed its claims, and the largest single stockholder, advised the corporation that thereafter it would use its efforts to carry out the plan which denied the parent company any equity. It seems to me it is very important as proving the fact that this corporation from this date on was in a state of corporate coma. It had no assets, it had no hope of preserving its equity, and the reason it didn't is that the principal parties who previously had furthered its claims for equity now gave word or said word that they no longer would attempt to preserve an equity but would work for the carrying out of the plan.

The Court: Well, the Supreme Court already said the stock was worthless.

Mr. Phleger: Yes.

The Court: What could they do about it? What difference did it make what those attorneys said between on and the other? As a matter of fact, as I understand the presentation so far, there is no question about the fact the holding company didn't have any more assets and it was wiped out—that is,

wiped out effectively, practically, even though the District Court didn't confirm the plan until a later date. It was effectively wiped out, practically wiped out, by the Supreme Court's approval of the plan.

Mr. Phleger: That is exactly—— [206]

The Court: So what is the materiality of this?

Mr. Phleger: That is exactly what we are proving. But, your Honor, there is a further point, and perhaps in an excess of caution we are not covering this. That is that it was necessary after this, and after the District Court approved the plan, confirmed the plan, that it be voted on by the creditors. And these people were large creditors of the subsidiary company, and by not voting for the plan they could still have upset the plan, because while the plan was confirmed by the Court, it required the approval of the creditors, and I intend to offer now the formal resolutions by these creditors, who, had they chosen to do it, could have stopped the reorganization at least temporarily by not voting for it. They could have forced the consideration of a further plan. But they now gave definite indication that they were through and would work actively for the consummation of the plan.

The Court: Well, you mean *the the* holding company could, by virtue of its position as a creditor, by voting against it, stop it?

Mr. Phleger: No, not the holding company, but these creditors to whom the James interset, for instance, that was a large creditor of the railroad company,——

The Court: Well, the only effect of that would have been that there would have been an adjudication in bankruptcy.

Mr. Phleger: No, it would probably have resulted—— [207]

The Court: I don't think that the creditors, or any person, be it creditor or otherwise, by refusing to vote for a plan that had been confirmed could do anything else except bring about the plaintiff's——

Mr. Phleger: Well, the confirmation, I think, came after the voting on the plan. The confirmation by the Court came after the voting by the creditors.

Mr. Adams: It is the law, however, your Honor, that if the Court had desired, it could confirm the plan over the adverse vote of the security holders, had the vote been adverse.

Mr. Clark: Well, may it please your Honor, so far as the interveners are concerned,——

The Court: Well, perhaps we are spending too much time on discussion in this matter now. It just occurred to me to wonder as to the materiality of these letters between attorneys. Mr. Phleger has explained it in a way, that it was in connection with whether or not they were going to take any further steps with respect to changing their vote as to participating in the plan. But it may be a factor in the chronology. I don't know whether it is of any importance or not.

Mr. Clark: No. The only relevancy is, your

Honor,—although we don't think it is the strongest evidence on the point—is that it shows that the James interests, likewise represented by Mr. Coulson, committed themselves to the railroad company as against the holding company. And from that [208] time on this whole pattern advantages the railroad company to the disadvantage of the plaintiff corporation. That is the point.

Mr. Adams: Your Honor,—

The Court: Well, the District Court hadn't confirmed the plan yet.

Mr. Clark: I know, may it please your Honor, but the plan and this failure to file a petition—

The Court: Well, when you are talking about the railroad company, who are you talking about at this time?

Mr. Clark: The railroad company is the defendant in this case, your Honor.

The Court: Yes, but the railroad company that is defendant in this case is the railroad company that came into being, as I take it, after the end of December of 1944.

Mr. Clark: No, your Honor, it is the same railroad company and has been since 1917. It is the same corporation.

The Court: Well, you mean not the same corporate form, or, rather, you mean the same corporate form but it is not the same railroad company so far as who owns the railroad company goes, is it?

Mr. Clark: It is the same railroad company so

far as its corporate structure, so far as its assets. It is now in the hands of the creditors.

The Court: That is just a formality. It is not the same [209] people owning the railroad who owned it before.

Mr. Clark: Well, this holding company did not own it at that time, that is quite correct.

The Court: Someone else came into the ownership of the railroad company.

Mr. Phleger: Well, someone who had been a creditor theretofore.

The Court: Well, it is a different owner, so it is a different company. I don't care whether it is the same name or not, it is a different company. Smith doesn't own it any more; Jones owns it.

Mr. Clark: That is quite correct, as soon as the reorganization was completed, your Honor. But as of this time, the time that the evidence pertains to,—

The Court: Well, then, it is not the same railroad company, in fact, or the same owners of the railroad company, in fact, that you are talking about in the period of 1943, the period before the Court in this case, is it?

Mr. Clark: That is correct, your Honor.

Mr. Phleger: Well, if your Honor please, after all, every act of the reorganization trustees and every act of the reorganization committee was for the benefit of this present defendant. It is possessed of its assets, it assumed the liability, including counsel fees, for the handling of this tax mat-

ter; and whether or not you say it is the same corporate entity or [210] not, it is in fact the same corporate entity, but it is the successor to the liabilities and the assets and so forth that were for a time in reorganization. And they are the beneficiaries of all of the acts that we are talking about, those that took place in reorganization as well as those that took place thereafter.

The Court: Well, we are getting now into a discussion of the merits of the case, and I didn't intend that. It was merely in connection with the statement that Mr. Clark made as to the relevancy of these communications between the attorneys in May 1943; and Mr. Clark had made the statement that that was on behalf of the defendant. Well, as a matter of fact, it wasn't the defendant that is before the Court now, at that time.

Mr. Phleger: Oh, yes, your Honor.

Mr. Clark: Let me make a statement.

Mr. Phleger: May I interrupt for just a moment?

Mr. Clark: Yes, surely.

Mr. Phleger: The purpose for which we are introducing them is to show that as of that date, which is early in 1943, that the declaration of the only people who could further and make effective efforts to stop the consummation of the plan, that they had decided and so communicated to the corporation, that they would make no further such efforts, but that they thereafter would use their best efforts to carry out the [211] plan which wiped out

the equity. And that has, I think, a very effective bearing upon the condition of the plaintiff corporation and the time of its loss and its mental attitude and its ability to look after itself. That is the purpose for which we are putting it in.

The Court: Well, I don't attach too much to that. There is so much more that you have in the case that is so very much more important, that I don't see much point to some of this matter that you are now putting in.

Mr. Phleger: Well, if your Honor thinks that we have proven it sufficiently, we will not labor the point.

The Court: Well, don't take that attitude. I haven't studied these exhibits like you have.

Mr. Phleger: Well, I perhaps have cumulated some of the evidence here, but that is our point, that from here on there was no hope of the preservation of the equity, because the interests represented by Mr. Coulson had determined that thereafter they would work for the consummation of the plan, and so advised the corporation.

The Court: So far as I can see, up to this point, in the introduction of these various exhibits, irrespective of what interpretation either side may put on them, there doesn't seem to me to be much of a factual question here or that there is going to be presented in this case much of a factual question. It looks like it is pretty much a question of law, from the very beginning.

Mr. Phleger: Well, I think so too. I agree with

you. And that is why we are putting this in the form of documentary evidence.

The Court: Well, I am not intending that that statement necessarily is in favor of your side of the case, Mr. Phleger, but it just looks to me as if the whole chronology so far in this thing is not going to be dependent upon whether I have to accept anybody's statement as against anybody else's statement as to what happened in this matter.

Mr. Phleger: That is why we put it in in the form of documentary evidence. We think that that is the way to go at it.

Mr. MacKinnon: Well, your Honor, I think that that is true as far as the bare essential facts are concerned. I haven't any doubt that it can be stipulated on our part. But of course, as the record is being made, it will have to be amplified, because this is only a selection of documents, and a very limited selection.

Mr. Phleger: I think we will find that they are a very fair selection. They purport to be, or are intended to be,—

The Court: Maybe this is a good time to take a little recess.

(Recess.) [213]

Mr. Phleger: I will next offer in evidence as Plaintiff's Exhibit 50 a letter otherwise identified as intervener's 185. This is a letter on the letterhead of the Coulson firm signed by James K. Polk dated May 20, 1943, addressed to M. J. Curry, Vice

President of the Western Pacific Railroad Company, 37 Wall Street. This letter has become known as the paradoxical letter, and so far as any written communication, that is, letter is concerned, seems to be the first time in which the use of the stock loss of the parent for reducing taxes was suggested. The date is May 20, 1943, which was two months after the Supreme Court affirmed the plan. I will not read the entire letter because I think most of the contents are not particularly illuminating. It is addressed to Mr. Curry, and then on the bottom of page 2 is this paragraph:

“It may also be noted that it is clearly demonstrable that the consolidated return basis of reporting for the year 1942 as contrasted with a separate basis of reporting, was advantageous to the group. Since consolidated returns were filed for 1940 and 1941, any unused excess profits credit inherited in the common parent corporation, had separate returns been filed for 1942. A preliminary survey of the smaller affiliates indicates that they would have incurred no excess profits tax liability. The operating company, however, if placed on a separate basis without the benefit of the credit carry-overs, [214] would have been liable for a net excess profits tax liability of \$3,650,000 even if all other figures as shown in the return were left unchanged. This amount is offset by several factors. In the first place, on an individual basis, the operating companies’ interest on expense deductions would have increased \$705,000. It would have lost,

however, its allocable share of the net operating loss reduction of approximately \$438,000. Further, a portion of its earnings subject to excess profits tax rates would have been eliminated from normal tax rates. There would have been, in addition a reduction in the surtax rate on a separate basis of the 2% penalty for filing a consolidated return, which would have amounted to approximately \$200,000 in tax. All of these factors combine to establish a net tax advantage of in excess of \$1,550,000 in the adoption of the consolidated return under the separate return.”

I think he meant over the separate return. That, as your Honor will note, does not discuss the use of the 1942 return, which was to be filed a little bit later.

Mr. Clark: The use of this loss. This is the provision, however, which does discuss that.

Mr. Adams: The 1942 return had been filed at the time this letter was written. [215]

Mr. Clark: Yes, five days before.

The Court: It was a consolidated return.

Mr. Phleger: A consolidated return.

The Court: But it had not made the claim for the loss.

Mr. Phleger: That is right.

“There is a further possibility of adjustment under the internal revenue code provisions contained in Sections 23(g)(4) and (k)(5) by which the worthlessness of the operating company’s stock may produce a net loss for the year 1943 with pos-

sible carry-back applications. This is commented upon rather than suggested as of certain value, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless. This matter will receive more careful consideration when the completion of the reorganization makes possible the assertion of the claim for worthlessness of the operating company's stock."

There are some pencil notes on this one:

"Mr. Schumacher, to note, M.J.C.," that is Mr. Curry. And then addressed to "M.J.C.: interesting letter. T.M.S."

Mr. Levy: Very interesting.

Mr. Phleger: No, there isn't any "very" on it, just "interesting." [216]

Mr. Adams: "T.M.S." being Mr. Schumacher's initials and his endorsement.

Mr. Phleger: Correct.

(The letter referred to above was thereupon received in evidence and marked Plaintiff's Exhibit 50.)

Mr. Adams: I think since the document itself is the original paper and the Court may wish to examine it, and because this is a document of interest to all counsel in this lawsuit, I believe it would be proper to observe at this point that Mr. Schumacher had the custom of endorsing his comments

in a blue crayon pencil while Mr. Curry had the custom of marking his notations in a green crayon pencil, and this document is one of several which has those characteristics, and the Court, when seeing the markings, will understand whose markings they are and how they came to be there. [217]

* * *

Mr. Phleger: The next document which I shall offer as Plaintiff's Exhibit No. 51, otherwise identified as intervener's 60, is a typewritten memorandum from R. R. Coulson—that is Mr. Coulson—to J. K. Polk—that is Mr. Polk—denoted “urgent, June 26, 1943,” reading as follows:

“Will it embarrass in the Western Pacific situation if the corporate charter of the Western Pacific Corporation is cancelled by the State of Delaware by failure to pay its 1940 Delaware franchise tax prior to July 1, 1943?”

That is the parent corporation. On the bottom in ink, in the handwriting of Mr. Polk, signed with his initials, is the following, addressed back to Coulson:

“Until the revised provisions we are urging for incorporation into the internal revenue code are adopted, it is essential to protect the possible use of the net loss carry-back that the holding company continue until the consummation of the reorganization. It would require more study of the consolidated return regulations before all the advantages of continuation of a charter beyond June 30 can be noted.”

Mr. Adams: Counsel, the document just offered carries with it also a further notation to which I direct your attention.

Counsel refers to what is evidently a longhand endorsement [218] on the last exhibit reading "see letter May 26, 1943 from F. C. Nicodemus, Jr., which is intervener's exhibit 31A, and I desire to inquire whether counsel desires, in order that this record may be complete, that intervener's exhibits 31A and B shall be produced at this time, being part of this same record?"

Mr. Phleger: We do not propose to introduce them but if you would like them, we would be glad to put them in.

Mr. Adams: That is satisfactory to us, your Honor.

Mr. Phleger: I rejected them, because what I was trying to prove here was the interest of the tax attorneys in the preservation of the corporate charter of the parent corporation in connection with the tax matters. Now, if you would like the others then, if you will let me have them, I will put them in right now.

Mr. Adams: I take it Mr. Dickerson is in possession of the documents.

Mr. Phleger: Yes.

The Court: Suppose, Mr. Phleger, that the attorneys and tax attorneys for the company in reorganization for the trustees were total strangers to everyone concerned: wouldn't it be proper, and within the orbit of their activities, in aid of the estate, to accomplish a saving for the estate?

Mr. Phleger: Yes, but we have proved already and we will prove further they were at the same time acting as counsel for the parent corporation.

The Court: What is the significance of that?

Mr. Phleger: The significance of that is if there arose any duty by the parent corporation to have taken any action at that time, why then, the fact that it was represented by a common counsel that was giving legal advice in the tax matter, it would mean it could not be expected to take such action except with the advice of such counsel. In other words, the duality of legal representation of the two parties is shown by the fact that common counsel, common tax counsel for both was advising the parent corporation with respect to matters involving the continuance of its corporate charter.

The Court: Does it make any difference that the parent company had other assets than the ownership of the Western Pacific Railroad Company?

Mr. Phleger: Only it is evidence, and we think it is of some importance, with respect to charges of its inaction, and so forth, that it was without assets. It was struggling even to maintain its existence.

The Court: What bearing would that have in the matter? Suppose it was an individual who owned all of the stock of the Western Pacific Railroad?

Mr. Phleger: It has this very important bearing in the light of very obvious defenses which counsel for the defendant is constantly raising, that there

was some duty or obligation on the part of the parent corporation to step forward and do [220] something. Now, our position in that there was no such obligation or duty, of course, on its part. If it had a right it would not lose it because it did not act. But the defendant seems to think otherwise. He seems to think that the plaintiff was under some active duty to step forward and assert his rights, demanding this, that and all the rest, and we are showing it was in a state of corporate coma and it was represented at that time and taking tax advice from counsel who were employed and paid then at that time by the reorganization trustees and later by the reorganized company, and we think that is a very significant factor in judging whether any of the rights of the plaintiff arising out of the situation could have been lost to it by its inaction.

Mr. MacKinnon: Your Honor, I do not think that states the position of counsel for the defendant. It is our position they did not have any claim under any such a state of facts; that if they had a claim, that that claim was known to them at the time of reorganization and they should have come forward and asserted it at that time.

Mr. Phleger: That is just what I am saying.

The Court: Of course, we are in equity here and we should not pay too much attention to the form. In other words, I think offhand this case is going to center down, not so much to the manner in which things were done, but as to whether there is in fact

and in truth and in good conscience and in equity a valid [221] claim or not. That, I think, is the toughest hurdle the plaintiff has to get over.

Mr. Phleger: You will notice, your Honor, in the statement of counsel just now of the position of the defendant, his second point was it was the duty of the plaintiff to have come forward in the reorganization proceedings and assert his claim. Now, all of this line of evidence is just going into the point that it was not in a position to do that. It was in a state of corporate coma. It was dazed by the loss of its entire investment, and it was being represented and advised by counsel who were handling the tax matter, who were employed by the reorganization trustees, and who were later paid for their services, in part by the company, and for whose ultimate benefits the matter was handled. That is our point.

The Court: Of course, we are not dealing with the technical tax question. If we strip aside the corporate fiction, the plaintiff was the Western Pacific Railroad Company.

Mr. Phleger: That is right.

The Court: They owned all the stock, so it was the company. That comes down to the question, doesn't it, in the last analysis, of whether or not the owner in reorganization can get some, let us say, after-discovered right or asset out of the reorganization?

Mr. Phleger: No.—

The Court: If we are dealing in equity. [222]

Mr. Phleger: I think we have not perhaps made our position exactly clear. Our claim is not that we are entitled to share in any assets that were in the hands of the reorganization trustees or in the company as their successors, because we were the stockholder, and arising out of that stock.

The Court: You mean because of the creditors' claim?

Mr. Phleger: No, it is because the defendant, either through its trustees in bankruptcy or itself later took and employed for its own use in connection with these tax returns the tax loss, that is, the loss of the \$75,000,000 investment in its stock, and it took—like any other property of the plaintiff, and with that it discharged its tax liability of \$20,000,000. It is just as if it took a promissory note or something else and used it to discharge its tax liability, and thereby it obtained a benefit or advantage from the use of the plaintiff's property, which in good conscience it should account for. We are not tracing this through the continued ownership of the shares of stock or as attributable to the shares of stock. We are attributing it to the fact that in the tax returns, that were filed the loss of the parent corporation was utilized to offset the subsidiary's income, with the result that the subsidiary did not have to pay a tax which it would have had to pay had it not utilized the parent's stock loss.

Now, that hasn't anything to do with the fact that there was a technical affiliation which did con-

tinue after the loss. [223] It is property. Our point is that property, namely the tax loss belonging to the plaintiff corporation, was taken and utilized by the subsidiary corporation to satisfy its tax liability.

The Court: Why could not that question, Mr. Phleger, which I have suspected all along, and I think I said so already, is the question I have to determine—why can't that question be determined without all this business of my hearing what one lawyer said to another about it?

Mr. Phleger: Because there are all sorts of defenses, including the defense which has just been asserted here, namely, that granted, for the sake of argument that we do have that claim, it was lost because this moribund plaintiff, or rather this shocked plaintiff, did not appear in the reorganization court and asserted, and we are merely pointing out——

The Court: You are anticipating a defense?

Mr. Phleger: Well, and I think it is a point of the equities also, if your Honor please. I think one of the equities of this case is the fact that counsel employed, paid for by the trustees and later by the company, took over and handled this tax matter. I think that is an affirmative equity. But if you will read my opening statement of yesterday, I stated a proposition of law, which is the basic proposition of law, and we have just been talking about it, that is the basic proposition; but I do think, and it is perfectly obvious, that the

defendant is going to come forward and say, "Why didn't these people appear? [224] Why didn't they come in and tell Judge St. Sure of this? Why didn't they demand a contract? Why didn't they do all of these things?" As counsel said, they were an object of charity and time. As Coulsen said here in his memorandum, they haven't got enough money to prepare their tax returns.

The Court: Well, do you think it is necessary to put in all these matters in the affirmative case?

Mr. Phleger: I think it is a very definite equity here bearing upon the inequity of retaining the benefits that the defendant corporation, through its attorneys and its agents, took over and handled this tax matter and utilized for their benefit, for the benefit of the people who employed them and paid them, this tax loss.

The Court: You, of course, have studied this matter and I have not. I suppose I am responsible for starting this discussion, only with the thought in mind that some of what appeared to me to be unnecessary matter, making a very large record here, might be curtailed; but if you consider it is a part of the equitable showing which you wish to make, of course, you go ahead and present whatever you consider is proper on that.

Mr. Phleger: It will show, for instance, that all of these discussions about the tax loss, that is the main discussions were held in San Francisco with the counsel for the reorganization trustees and with the officers of the company here. It will

show that all of the negotiations for the settlement of [225] the case were conducted by these counsel employed by the trustees in the company without the knowledge of the plaintiff corporation. I think that creates equities.

Now, if counsel wants to withdraw its position that because we did not do something we lost a right which we otherwise would have, I would be very glad not to put in so many of those exhibits, but I will say, your Honor, I have called down over 2000 exhibits to about 80, and the original offers that were made here, both by defendant and intervener, added up to some 1200 exhibits and I thought as a result of a lot of hard work I really had got it down to something pretty small.

The Court: Well, go ahead with the exhibits.

(Memorandum dated June 26, 1943 was thereupon received in evidence and marked Plaintiff's Exhibit 51.) [226]

* * *

Mr. Phleger: 52, yes, consisting of two sheets, as I say, identified as intervener's 31A and 31B.

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit 52.)

Mr. Phleger: The first sheet is a letter on the letterhead of Pierce and Greer dated May 26, 1943, signed by F. C. Nicodemus, addressed to Mr. Polk:

“Attached is form of communication to security holders which the Western Pacific Railroad Corpo-

ration would like to hand out to persons applying at its office for information as to the status of the corporation.

“Is there any reason in your mind, in connection with [227] your letter to the railroad corporation of May 20, 1943, why the corporation should not do this?”

“Yours very truly,
F. C. Nicodemus.”

At the bottom in longhand——

Mr. Adams: In Mr. Polk's handwriting.

Mr. Phleger: In Mr. Polk's handwriting, which I have difficulty reading, and you might help me——

Mr. Adams: It is dated May 26.

Mr. Phleger: 5/26.

* * *

Mr. Adams: (reading)

“Mr. Nicodemus phoned me before a reply could be prepared and I told him I had no objection save that the actual dissolution should be deferred until the plan consummation in any event—perhaps longer, as tax aspects warranted. J.K.P.” [228]

* * *

Mr. Phleger: No, I have already offered it.

I will offer as Plaintiff's Exhibit 53 a memorandum also identified as intervener's 116 dated January 8, 1944, signed by the initials J.K.P., Mr. Polk. It is, your Honor, I think, an important memorandum. It deals with the tax matters.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 53.)

“Memorandum

“In Re: Western Pacific

“Reorganization Trustees

1943 Federal Income Tax Return

“Conferences were held today with Mr. Elsey, Mr. Englebright, Mr. DeGraff, and Mr. Gloster at the Company offices, and with Mr. Elsey and Mr. Matthew at luncheon in connection with the deduction to be claimed by the parent company on loss on the operating company's stock, their affect thereof upon the tax liability of the subsidiary operating company:

“It was explained that under Internal Revenue Code provisions losses on the stocks of operating subsidiary [229] companies were specifically removed from the capital gains and loss classification and accordingly allowed as operating losses and, on consolidated return treatment the parent company loss could offset subsidiary company incomes.

“The Western Pacific Railroad Corporation's investment in the (operating) Western Pacific Railroad Company's stock has been shown at \$75,000,-000. The basis is under any calculation well in excess of the operating income of the operating company for 1943.

“There has been accrued on the operating com-

pany's books through November a reserve for Federal tax liability of approximately \$7,500,000. Since there will be no tax liability if this operating loss deduction on the consolidated return basis is allowed the suggestion was made that the books of account be adjusted so as to reflect at December 31 no accrual for Federal tax liability on the part of the operating company for 1943.

"After considerable discussion it was decided tentatively to set up a "Reserve for Road Improvement" in an amount approximating the \$7,500,000 figure. This action is to be taken upon order of the court after appropriate application for same. As a preliminary step the procedure is to be further studied and submitted to the Reorganization Committee for their approval, which if [230] obtained is to be then submitted to the trustees for their approval. In support of the dollar reserve, accrual engineering studies are to be compiled showing cost of change of existing rails from 80 to 112 pounds, installation of continuous block system, substitution of concrete for timber tunnel linings, and possibly extension of centralized traffic control. Studies are also to be included of cost of acquiring modernized passenger and freight equipment. Further conferences are to be held Monday on these matters."

I think the rest of the letter is not important.

Mr. Clark: Isn't that the memorandum that requests an opinion, Mr. Phleger?

Mr. Phleger: No.

Mr. Adams: Yes, it is.

Mr. Clark: The last sentence.

Mr. Adams: There is a short balance. You might read that into the record.

Mr. Phleger:

“Mr. Gloster furnished the undersigned with a preliminary draft of engineering studies on machinery and equipment investments for consideration in connection with the Bureau requirements for submission of data under Treasury Mimeograph 58.

“Discussions were also had with Mr. Matthew and Mr. [231] Elsey concerning the program for corporate readjustments and substitute lease arrangements with the Salt Lake City Union Depot and Railroad Company. Mr. Matthew has completed a draft of lease and a copy is to be furnished me for review. In the draft Mr. Matthew has made provision for limited preferred stock dividend requirements, but in the light of the discussion of Mr. McAllister’s suggestions has noted that these provisions are subject to revision to accord with the proposals prepared by Mr. Hart and the undersigned. Mr. Matthew is to join in the conference to be held Monday in regard to both the tax return and the Salt Lake Depot matters. A request was made that opinion letter of counsel be drafted covering the tax return deduction item and this will be done after review of the applicable statutory provisions Monday.

J.K.P.” [232]

The Court: Is this what you referred to in your chronology as the accrual reversal, in January of 1944?

Mr. Phleger: That is the first mention of it, yes. That is the conference at which the reversal of the accruals and the setting up of a reserve was discussed.

Mr. Adams: This is Mr. Polk's memorandum.

Mr. Phleger: Correct.

Mr. Clark: This is the period of time——

The Court: This is the subject matter that you are referring to, January of 1944, is that right?

Mr. Phleger: That's right. We are coming now to the Coulson opinion letter.

I will now offer in evidence as Plaintiff's Exhibit 54 a letter known as his "opinion letter," and it is evidently the letter which is mentioned in the memorandum just placed in evidence.

Mr. Adams: Your chronology order is in reverse. The memorandum speaks of an opinion to be rendered, and you are now speaking of the opinion subsequently rendered.

Mr. Phleger: That's right.

(Letter dated January 11, 1944, from Whitman, Ransom, Coulson & Goetz referred to was received in evidence and marked Plaintiff's Exhibit 54.)

Mr. Phleger: Exhibit 54 is a letter on the Coulson letterhead, signed by "Whitman, Ransom, Coulson & Goetz." You will [233] stipulate that that

was in effect signed by Mr. Coulson in behalf of the firm?

* * *

Mr. Adams: The signature of the firm, the firm name, "Whitman, Ransom, Coulson & Goetz," is Mr. Coulson's handwriting.

Mr. Phleger: This letter, your Honor, is an important letter and is the legal opinion upon which these tax actions were taken, including the reversal of the accruals for 1943 and the setting up of the reserve just mentioned. It is addressed to Mr. Charles Elsey, President, Western Pacific Railroad Company, 526 Mission Street, San Francisco, California:

"Dear Sir:

A preliminary review has been had of the statements of income and expense of the Western Pacific Railroad Corporation, the Western Pacific Railroad Company and the several subsidiaries of the latter company. This review was made with particular regard to a consideration of the applicability of [234] Internal Revenue Code provisions to the transactions of the several system companies in order that there might be made at this time as definite as possible an estimate of Federal income and excess profits tax liability for the year 1943.

In view of the elections heretofore made and of the continuation during 1943 of the stock ownership of the subsidiaries by the Western Pacific Railroad Company and the stock of that company

by the Western Pacific Railroad Corporation the tax liability is to be determined on the basis of consolidated returns. In the determination of taxable net income on a consolidated return basis the losses of affiliated companies are offset against the gains of other affiliated companies and resulting net income of the group alone is subjected to tax.

Under the Interstate Commerce Commission plan of reorganization the capital stock of the Western Pacific Railroad Company was deemed worthless and the holder of that stock excluded from participation in the securities provided under the plan for issuance by the reorganized company. The Commission plan was from the time of its inception vigorously contested by the holder of capital stock of the railroad company and others. The plan was first [235] sustained by the United States District Court, but prior to January 1, 1943, the action of the United States District Court had been reversed by the United States Circuit Court of Appeals, so that there was sound reason for expectation that the holder of capital stock of the Western Pacific Railroad Company would participate in the securities in the reorganization. The capital stock was definitely not worthless at the beginning of the year 1943.

During 1943 the Supreme Court of the United States reversed the United States Circuit Court of Appeals and there was thus reinstated the Interstate Commerce Commission reorganization plan.

Later during the year the United States District Court, after completion of all legal requirements, entered its order of confirmation of the plan. During 1943 therefore the stock of the Western Pacific Railroad Company owned by the Western Pacific Railroad Corporation became worthless.

The stock of the railroad company was originally issued to the railroad corporation upon the transfer of the operating properties to the railroad company at the time of its organization. Both the railroad company and the railroad corporation have [236] at all times reported to the Federal Government the value of this stock of at least the par amount of \$75,000,000. A review of the company records of dealings with the Bureau of Internal Revenue does not indicate that its value has been disturbed. For the purpose of preparation of the 1943 Federal income and excess profits tax returns this valuation and basis of \$75,000,000 for the stock of the Western Pacific Railroad Company in the hands of the Western Pacific Railroad Corporation appears proper and should, except as noted below, be adopted without change.

It is apparent from the foregoing that the stock of the Western Pacific Railroad Company having a basis to the Western Pacific Railroad Corporation of \$75,000,000 became worthless during 1943. Under Sections 23(f) and (g) of the Internal Revenue Code provision is made in the determination of taxable net income for deduction of losses sustained by corporations.

It is of particular importance to note that under certain circumstances in the classification of losses there are excluded as capital losses those sustained upon the stock of affiliated corporations becoming worthless. The Western Pacific Railroad [237] Company meets the statutory requirements so that the worthlessness of its stock during 1943 does not become a capital loss to the railroad corporation but falls into the general loss deduction provisions of Section 23(f). There are attached copies of the Code provisions above referred to and of Section 29.23(g)-2 of Regulations 11 which contains the interpretation of the Commissioner of Internal Revenue of these loss provisions.

It will be noted that while the stock of the Western Pacific Railroad Company became worthless sometime during the year 1943 the affiliation status continued throughout 1943. The inclusion of the Western Pacific Railroad Company in a consolidated return for the entire year 1943 with the Western Pacific Railroad Corporation is therefore proper.

Under Internal Revenue Code provisions a loss equal to the adjusted basis of the stock is recognized. The "adjusted basis" in the Western Pacific case is the cost (which is claimed to be \$75,000,000) less any distributions of the operating company out of capital, less losses availed of by the parent company in prior year consolidated returns, etc., all of which appear from preliminary review [238] to be negligible in amount. Accord-

ingly, there will be allowed in the consolidated return a loss to the parent company of approximately the cost of the railroad company stock. This loss however computed would appear to far exceed the incomes of the other members of the affiliated group. Accordingly, for the year 1943 on a consolidated return basis there would appear to be no excess profits tax or income tax liability.

At our request there are being prepared analyses of taxable incomes and losses by each of the affiliated companies over the entire period 1917 to 1943 during which consolidated returns were filed. Similarly, information is in process of assembly from which it can be determined if any distributions by the railroad company were out of capital, etc. From these studies it will be possible to reflect in the computations of loss on the worthlessness of the subsidiary company's stock the proper adjustments for operating losses of the subsidiary availed of to offset parent or system companies' incomes in prior consolidated return periods, returns of capital, etc. Our preliminary review however indicates that any such adjustment of the [illegible] and consequent diminuation of the loss deduction in 1943 will be relatively minor and that the remaining loss will be far greater than the operating incomes of the other affiliated companies for 1943, so that the final computations will reflect net losses on the consolidated income and excess profits tax returns with the resultant showing of no tax liability for any of the system companies for 1943." Attached is a

copy of certain sections of regulations 111, and of chapter I of the Internal Revenue Code.

I will now offer as Plaintiff's Exhibit 55 a letter otherwise identified as Defendants' Exhibit 844, dated January 18, 1944, from Robert E. Coulson to Mr. Frederick H. Ecker, Chairman of the Board, Metropolitan Life Insurance Company, 1 Madison Avenue, New York, New York. Mr. Ecker was one of the reorganization committee, with Mr. Coulson.

Mr. Adams: He was chairman of the committee.

Mr. Phleger: Unless counsel wishes otherwise, I will read only one paragraph, the whole not being germane:

"Looking at The Western Pacific Railroad Company as a separate corporation, it would show an aggregate liability for Federal taxes, income and excess profits for the year 1943, of upwards of \$7,000,000. The company has, however, been joining in a consolidated return with The Western Pacific Railroad Corporation, the holding company, in [240] prior years and will necessarily so report as to 1943. Under the Internal Revenue Code, the holding company is entitled to a substantial deduction in 1943 because of the judicial declaration that the stock of the operating company, which it owned, is without value. The resulting 1943 loss will apparently exceed the operating profits of the railroad for 1943. We have advised the Bankruptcy Trustees that the tax report of the consolidated group for 1943 should take that position.

While the position so taken is technically sound, it will no doubt be questioned on Treasury Department audit. The amount of tax which the operating company would pay in reporting as a separate entity should, of course, be set aside, quite separate from the general funds of the enterprise. The management in San Francisco wish to set aside the sum and invest it in Federal bonds so that it will be available for such tax payment in the event the position taken on the consolidated return should not be successfully maintained. This seems to us a quite proper and necessary course. If you see any reason why such a funded reserve should not be set up, please let me have your comments, if possible on or before next Saturday, January 22. [241]

Sincerely yours,

ROBERT E. COULSON."

There are several similar letters which I will not offer because I think they are merely cumulative.

(Letter dated January 18, 1944, from Robert E. Coulson to Mr. Frederick H. Ecker, was received in evidence and marked Plaintiff's Exhibit 55.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 56 what is otherwise identified as Interveners' 69-A, 69-B and 69-C, two letters of Charles Elsey. The first is dated January 24, 1944, signed by Mr. Elsey, copies to Mr. T. M. Schumacher, Mr.

A. P. Matthew, Mr. Robert E. Coulson, for Reorganization Committee.

(Letters dated January 24, 1944, signed by Charles Elsey, were received in evidence and marked Plaintiff's Exhibit 56.)

Mr. Adams: If I may interrupt, this document that counsel is about to read from—there is no question about its authenticity, but it is a copy, and there is also in the record the original of the letter. I suggest that the original be used in the course of the presentation.

Mr. Phleger: Well, we will see if we can find it. May I proceed to read, and then we will substitute the original if we can find it.

Mr. Adams: That is quite all right. Go right ahead.

Mr. Phleger (Reading): [242]

“Mr. Sidney M. Ehrman:

In order to bring Mr. Schumacher up to date on the Federal tax situation, following Mr. Polk's visit and my conversation with you, the attached letter has been written.

Please note the question asked in the last paragraph of that letter and advise me whether you wish to extend approval for the creation of a contingency fund and its investment as a protection against a possible adverse outcome of discussions with the Treasury Department concerning 1943 Federal taxes.”

The attached letter, signed by Mr. Elsey, dated

January 24, 1944, and addressed to Mr. T. M. Schumacher, copies to Mr. Ehrman, Matthew and Coulson for Reorganization Committee, reads as follows:

“Mr. T. M. Schumacher:

Mr. James K. Polk of Mr. Coulson's firm was recently in San Francisco and explained to us the reasons why Western Pacific should not make any accrual for consolidated Federal income and excess profits taxes for 1943. We have received a letter from Mr. Coulson, dated January 11, copy of which is enclosed, which sets forth the reasons for such a conclusion in considerable detail.

Through November, 1943, we had accrued for Western Pacific, the amount of \$6,750,000 in anticipation of such taxes and the Western Pacific total for 1943 would have been approximately \$7,069,000. Because we now assert that there will be no Federal income tax liability on a consolidated return for 1943, it will be obvious that it would be unwise to let such an accrual stand on Western Pacific income accounts. Our books close about the 18th and after discussion with Mr. Matthew and Mr. Ehrman, arrangements were made for appropriate entries in the December accounts which entirely eliminated all Federal income and excess profits tax accruals from the income accounts of Western Pacific and other subsidiaries of the Western Pacific Railroad Corporation.

There is a possibility that our position in this matter may eventually be successfully overruled

by the Treasury Department. This raises the question of contingent liability for such taxes in that event. Consequently, we will show such a contingent liability on a supplementary statement accompanying railroad company balance sheets, as directed by Special Instruction #4 of the ICC accounting classification for balance sheet accounts, pending final settlement of the issue. [244]

In the case of Western Pacific, major contributor to any taxes paid by the corporation, the sum which would have to be paid in the event of an adverse outcome is so substantial that we believe it should be set aside in an earmarked fund—preferably in Government bonds—pending final determination of the issue. Such a fund for the Western Pacific would be approximately \$7,100,000. The amounts involved for the other subsidiaries are nominal and need not be set aside.

Please let me have your instructions with respect to the proposal to create a contingency fund and its investment in Government securities. If you approve the proposal, I will arrange with Mr. Mathew for necessary application to the Court for formal authority to carry the matter to a conclusion.

In a separate letter, copy of which is attached, I am presenting the proposal to Mr. Ehrman for his view.”

(Whereupon a conversation among counsel occurred out of the hearing of the reporter.)

Mr. Phleger: While they are looking for the

original, I will now offer in evidence the admission by defendants of certain requests, Request 12:

“The company, through the reorganization trustees, set aside in a reserve fund \$7,100,000 for the contingent tax liabilities pursuant to an order of the bankruptcy court made that day, and with the funds purchased \$7,100,000 of United States Treasury Savings Notes, Series C, which are still in the possession of the company.”

Railroad's response:

“Admit, except that the reserve fund was set aside by the reorganization trustees and not be the defendant, the Western Pacific Railroad Company.”

The Western Realty response admits that \$7,100,000 was set aside for a reserve against contingent liability by the reorganization trustees, and refers to the order for a true and correct statement of its provisions.

The request 13 has to do with the \$3,000,000 fund:

“On March 26, 1945, the company set aside as a reserve against contingent federal tax liabilities for the first four months of 1944, the further sum of \$3,000,000, and purchased therewith United States Treasury Savings notes Series 3, which are still in the possession of the company.”

Railroad's response:

“Admit, except that the reserve set aside as a reserve against contingent federal tax liability was set aside [246] by the defendant, the Western Pa-

cific Railroad Company, and not by the debtor in reorganization.”

In other words, it was set aside by the defendant, and still in its possession.

The Western Realty response admits that \$3,000,000 was set aside as a reserve against contingent federal tax liability by the defendant.

I will call your attention to the fact that both admissions are that funds are now in the possession of the defendant, the first fund of \$7,000,000 having been set aside by the trustees in reorganization and the second fund of \$3,000,000 having been set aside by the defendant company; both admitting that the funds are now in the hands of the defendant.

Mr. Adams: Yesterday counsel read into the record the statements of Western Pacific Railroad Company in respect of these funds, pointing out that in the annual reports for later years, the description of the fund has been changed from its original import, which was to serve as a reserve fund for contingent tax liability, so that it now stands as a reserve fund in respect of contingent litigation liability. The tax questions having been closed and settled. I think that that statement is a fair statement. It seems to me an attempt to recall at this moment something that counsel read into the record yesterday.

Mr. Phleger: Yes. Well, that is quite true. The chief object of our request for the admission was to show that those [247] funds are presently

in the hands, in that form, of the defendant company. [248]

* * *

I will first offer as Plaintiff's Exhibit 57 two sheets otherwise identified as Interveners' Exhibit 293, 352 and 353.

(The sheets referred to were received in evidence and marked Plaintiff's Exhibit 57.)

Mr. Phleger: It consists of certified copies of resolutions of the A. C. James Company, the board of directors of the A. C. James Company, April 28, 1943, resolving "That it is in the interest of the company that the reorganization of the Western Pacific Railroad Company be effectuated at as early a date as possible on the basis of the Commission plan."

Mr. Adams: Will you read the balance, Mr. Phleger. It is only four lines.

Mr. Phleger: "—and that counsel for the Company be instructed to so advise other interested parties and to take any further steps in his discretion to carry out the indicated objective."

The second resolution is that of the James Foundation of New Lork, Incorporated, meeting of the board of directors April 28, 1943, the substance of which is the same as the resolution just mentioned.

I will now offer as Plaintiff's Exhibit 58 the petition of the trustees in bankruptcy for authority to establish a reserve fund for contingent tax liabilities, that being the \$7,100,000 reserve that has

been frequently mentioned. I only desire to direct the Court's attention to one statement in it, and that is that the estate of the debtor contains sufficient cash derived from the earnings of the railroad, of the debtor, during the year 1943 to establish a reserve fund in the amount of \$7,100,000 without using funds required for other purposes. [250]

(The document referred to was received in evidence and marked Plaintiff's Exhibit 58.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 59 three sheets otherwise identified as Interveners' Exhibits 412-B, 443 and 442. These are reports filed with the Interstate Commerce Commission reporting the contingent assets and liabilities of the railroad company.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 59.)

Mr. Phleger: I will direct attention to the fact that in the report for the year ended December 31, 1943, of the ICC, the reserve just mentioned is reported in the following terms:

"Contingent Liabilities: The Western Pacific Railroad Company has been reporting for Federal tax purposes on consolidated return with various affiliated companies. Certain companies had substantial deficits and credit carryovers affecting the year 1943. Tax counsel has advised that on the basis of a consolidated return no Federal income or excess profits tax will be properly payable for

the year 1943. In view of the present uncertainties of the consideration of new Federal tax laws, it has been deemed advisable as a precautionary measure to set aside a funded reserve in the amount of \$7,100,000 which will be invested [251] in Government securities as an estimate of at least the amount of Federal income and excess profits tax that the Western Pacific Railroad Company would have to pay if it were reporting on an individual basis rather than as a part of a consolidated group of corporations.”

Mr. Adams: The figure, Mr. Phleger?

Mr. Phleger: The figure is \$7,069,052. This is from page 228-B of the annual report form of the Interstate Commerce Commission for the year ended December 31, 1943.

Mr. Adams: I think it is page 228.

Mr. Phleger: The second sheet is the similar report for the year ended December 31, 1944, and shows a reserve on contingent liabilities for the same amount. The third sheet is a similar report for the year ended December 31, 1945, showing the item for contingent liabilities in the same amount, but with the additional statement of contingent assets:

“The Western Pacific Railroad Company paid an amount of \$4,144,828.87 as its proportion of the Federal income tax for the year 1942 on the basis of the consolidated return of the various other affiliated companies. Claim for refund of the entire amount paid under consolidated return amount,

\$4,201,821.54, was filed by the Western Pacific Railroad Corporation on March 9, 1945." [252]

The figure opposite that being \$4,144,829.

I will next offer as Plaintiff's Exhibit 60, otherwise identified as Interveners' Exhibit 454, a letter on the letterhead of the Coulson firm under date of March 5, 1944, signed by Robert E. Coulson, addressed to Mr. Charles Elsey, President, The Western Pacific Railroad Company.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 60.)

Mr. Phleger: I will direct the Court's attention to the last paragraph. This has to do with the advisability of certain amendments to the California State Corporation Law so as to permit the continued use of the corporate charter of the debtor in bankruptcy.

"Needless to say, I hope you will be able to give the matter attention promptly, as it will be a great safeguard to have the statute on the books in California in the event we are not able to secure a contractual transfer to the reorganization committee of the stock of the operating company. The advantage of using the old operating company corporate shell for the purposes of reorganization are so substantial that I would be entirely willing to see the reorganization delayed, if necessary, for as much as three months rather than to be forced to effectuate the reorganization through [253] the organization of a new company."

I will now offer in evidence as Plaintiff's Exhibit 61, also identified as Interveners' 202, a letter on the letterhead of the Coulson firm under date of October 16, 1944, signed by Robert E. Coulson, addressed to Mr. Elsey.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 61.)

Mr. Phleger: This also deals with certain matters arising out of the use of the charter of the defendant, the debtor in reorganization, and having to do with certain tax incidents and the setting up of its books. This is the last two paragraphs on page 2.

Mr. Adams: On what page? There are several pages in this letter.

Mr. Phleger: Page 2.

"You no doubt have clearly in mind one basic factor involved in this entire problem. Section 77 in the melding of related reorganizations under the Bankruptcy Act, technically gives legal title to the property of the debtor to the bankruptcy trustees. The Treasury Department might have used this technical aspect to justify them in taking the position that the bankruptcy trustees were a new taxable entity, which ought to report earnings of the properties and make no deductions for interest paid or accrued on the outstanding obligations of the debtor, but only on obligations actually incurred by the trustees (trustees' certificates) or on obligations definitely assumed by the bankruptcy

trustees. The Treasury Department, after a good deal of internal discussion in general counsel's office has reaffirmed a policy which regards the debtor as a continuing entity. This has permitted the debtor to deduct accrued interest on the old obligations which were outstanding up to the date of consummation. I need not tell you that this is enormously important from a dollars and cents point of view during the recent excess profits tax years."

I will now offer as Plaintiff's Exhibit 62 a telegram otherwise identified as Defendants' Exhibit 933. It is a telegram dated December 20, 1944, signed Robert E. Coulson, addressed to Charles Elsey, President, The Western Pacific Railroad Company, San Francisco.

(The telegram referred to was received in evidence and marked Plaintiff's Exhibit 62.)

Mr. Phleger (reading):

"Mr. Polk and I have been discussing treatment of Federal tax matters for the calendar year 1944.

It seems clear that the only course open is to proceed as indicated in conversations with you, including report on a consolidated basis up to May 1, with a later determination as to consolidated or separate basis for the balance of the year during which holding company no longer held operating company's stock. Mr. Polk has arranged to defer any readjustments on books of account as suggested by Interstate Commerce Commission Bureau of Accounts until after a conference with

Bureau of Accounts on January 17 and has so advised Mr. DeGraff.” [256]

* * *

I will now offer as Plaintiff’s Exhibit 63 a document otherwise identified as Interveners’ 223-C, consisting of a memorandum dated January 23, 1945, signed by J. K. Polk, that being Mr. Polk, addressed “Memorandum for Colonel Coulson.” The journal entries refer to completion of reorganization.

(The document referred to was received in evidence and marked Plaintiff’s Exhibit 63.)

* * *

Mr. Phleger: The paragraph I would like to direct the Court’s attention to is as follows:

“It was clearly understood and agreed that under no circumstances”——

Mr. Adams: What page, please?

Mr. Phleger: This is page 1, last paragraph.

(Continuing reading): “——would the corporation jeopardize its primary tax advantage deliberately secured through the maintenance of the continuity of the 1916 corporation by voluntarily filing any proposed journal entries of the type suggested in the letter of December 6, 1944. Subject to such amendments, additions and corrections of dollar figures as will develop from the use of the December 31, 1944, closing figures, it is the position of counsel and of Colonel Coulson as a member of the Board, that the entries reflected in principle in the memorandum of January 17th conference

should form the basis of the proposed journal entries to be prepared and submitted for Interstate Commerce Commission consideration.

“There is attached a photostatic copy of a work sheet reflecting the type of balance sheet before and after journal entries of the kind indicated in [258] the January 17th memorandum. It was noted, of course, that the position estimated as of December 31 will probably vary materially in the cash and current asset qualifications from the actual figures which will form the starting point for the proposed journal entries and schedules to be submitted to the Interstate Commerce Commission. It will also be noted that the resulting balance sheet will reflect an unearned surplus of approximately \$83,000,000 and that of this sum only the amount of \$75,800,000 is to be classified as ‘paid in surplus’ for Federal income tax purposes, the balance constituting ‘accumulated earnings and profits’ in any invested capital or source of dividend distribution computation.”

Mr. Adams: The document consisting of five pages and being a memorandum of Mr. Polk.

Mr. Phleger: I will now offer as Plaintiff’s Exhibit—

Mr. Adams: May I ask, if I may interrupt? You read a portion which contained a reference to work sheets. You have offered, however, simply the document of five pages, I take it?

Mr. Phleger: That is correct.

I will now offer as Plaintiff’s Exhibit 64 a let-

ter otherwise identified as Interveners' No. 68, which has been referred [259] to variously as the "first Krigbaum letter." It is a letter——

Mr. Adams: Now, just one minute. I don't understand that reference, and it is the first time I have heard it.

Mr. Phleger: Well, I am going to call it that. It is the first letter written in connection with the tax matters by the Coulson firm to C. R. Krigbaum, Internal Revenue agent in charge, 225 Broadway, New York. There was a later letter written to Mr. Krigbaum, which I will later refer to as the "second Krigbaum letter." This letter is dated May 31, 1946, is signed by "Whitman, Ransom, Coulson & Goetz," addressed to Mr. C. R. Krigbaum, Internal Revenue Agent in Charge, 225 Broadway, New York.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 64.)

* * *

Mr. Phleger: The next document I offer in evidence as [265] Plaintiff's Exhibit 65, otherwise identified as Interveners' 103. It is a power of attorney from the Western Pacific Railroad Corporation, under date of June 26, 1946.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 65.)

Mr. Phleger: This is after the Krigbaum letter.
The Court: The next month?

Mr. Clark: About a month later. [266]

* * *

Mr. Phleger: My statement was not intended as evidence.

I will now offer as Plaintiff's Exhibit 66 a document otherwise identified as Interveners' No. 205.

* * *

Mr. Phleger: I use the universal "we." The supplemental complaint was filed, your Honor, on December 17, 1947, long after all of these events that we are talking about now. And the subject matter of it in part were the events, as is appropriate with the supplemental complaint, that took place after the filing of the original complaint. So with respect to the manner and method of settlement, what was done, how it was handled, in what manner, those are all germane and are matters of evidence in this suit, because they all took place before the filing of the supplemental complaint which set them forth as the basis of the supplemental complaint.

The original complaint, may it please your Honor, was before the final decision that the defendant would actually receive any benefit as a result of the tax returns. As the evidence will show, it was not deemed that the benefit or advantage had actually been received by the defendant until the tax settlement was made, which was in August of 1947. And so it seems to me that there should be no question——

The Court: Yes, but Mr. Phleger, you are not complaining about the tax settlement.

Mr. Clark: No, no, indeed.

Mr. Phleger: No, no.

The Court: Therefore any statement that you would want to put in as to what an attorney said with respect to that matter might be no more than what attorneys say or do in the course of litigation.

Mr. Clark: That is not the point.

Mr. Phleger: That is not the point, your Honor, but what the attorney here characterizes the president of the corporation as, and his duality, and so forth, I take it is evidence, whether it happened before or after the filing of this suit. Now, this telegram is introduced——

The Court: Well, what does the telegram say, and maybe I can rule upon it? [274]

* * *

Mr. Phleger: This is a wire from Mr. Coulson to Mr. Matthew, dated December 7, 1946:

“We have an embarrassing situation in connection with examinations before trial in pending stockholders’ suits because of various capacities in which Curry has acted. He is president of the holding company. As such he holds certain files and papers of the holding company. We have pointed out necessity of distinction between these files and files of correspondence written or received by [275] him or Schumacher as former officers of the operating company. These files belong to operating company and should be technically in our custody as tax counsel insofar as they involve the tax matters. Curry raises question under your letter May 8, 1945, to bankruptcy trustees. Schu-

macher asked Curry to act as his representative in retaining custody of trustees' books and records. This has been construed to include all correspondence with officers of operating company during reorganization period. In our judgment records directly affecting operating company must necessarily be turned over to operating company by bankruptcy trustees even though they remain available to bankruptcy trustees. Can you clear this situation by wire to us or directly to Mr. Curry?

COULSON."

Now, we are offering that as being a declaration or statement by Coulson as to the duality in capacity being occupied by Mr. Curry and what resulted from them, in this particular respect.

Mr. MacKinnon: How is that binding, your Honor, on the defendant?

The Court: It doesn't make any difference, Mr. Phleger, about what Mr. Coulson says about it, does it? [276]

Mr. Phleger: Except that Mr. Coulson was the attorney for the defendant corporation in these matters.

The Court: Well, whether he says the man is acting in a dual capacity or not isn't of any importance. The facts will show that.

Mr. Phleger: May I suggest to your Honor that the state of Mr. Coulson's mind as to his knowledge as to whether or not this man, who was the president of the holding corporation and also the vice president and other officers of the operating

company, was in a dual capacity—the state of Mr. Coulson's mind is a fact which we are entitled to prove.

Mr. Clark: Plus the fact that Mr. Coulson is now a director of this defendant.

Mr. Phleger: What Mr. Coulson thought Mr. Curry's capacities were—he was acting for him, he had the power of attorney of the corporation, signed by Mr. Curry. I think his state of mind, his knowledge of the fact that Mr. Curry was on two sides, is important.

The Court: Well, you have already established, according to the record, the various capacities of Mr. Curry, haven't you?

Mr. Phleger: I have tried to establish that Mr. Coulson knew it.

Mr. Clark: This establishes the consciousness, your Honor. [277]

Mr. Phleger: And that Mr. Matthew was informed of Mr. Coulson's knowledge.

The Court: Well, how could he help knowing it?

Mr. Phleger: I don't know how he could help knowing it, but——

The Court: I don't see any particular importance to this telegram. I also don't see any harm in having it in evidence. But if Mr. Curry, as the record shows, was occupying these various positions, well, the fact that Mr. Coulson says he was, if in fact he was, doesn't add anything to it. You say it is important that this knowledge be shown. But does it need that telegram to show that?

Mr. Phleger: I think it is one way of showing it. He was dealing with this man, and I thought it important to show that he knew in his own mind that he was acting in a dual capacity.

Mr. Levy: Your Honor, with Mr. Clark's permission—he has permitted me to say a few words—I think the relevancy of this exhibit has been talked around, but not talked at, and I think that it has one very strong basis for admission. If your Honor is mindful of one of the theories that we have presented in this case and that we still present in this case; namely this, that apart from the theory of duality and apart from the theory of unjust enrichment, we believe and we believe the evidence justifies our presentation of this theory, and in fact requires it, that there was a conscious use of this corporation for the benefit of the railroad company, and that that letter led to a legal theory other and apart from any that we have discussed, and that it will perhaps lead to a different result as to the quantum of recovery.

Now, in an effort to prove a conscious use of another corporation, you have to prove acts. You want to prove motive, and you want to prove position. And I don't think that in order to prove any of those things during a particular period you are restricted to the event of that period, to the extent that anything may occur later that has a reflection backwards. It is just pertinent and just as proper as evidence of what was the then con-

duct during the period with which we are concerned. Now, let's document that for a moment.

During the period of the tax transaction, that is, the signing of the 1943 return, the filing of the refund claim for 1942, the signing of the 1944 return—and that brings us on this chart to June 15, 1945—during that period, we say, Mr. Coulson's firm had, and Mr. Coulson personally had, this conscious purpose which he exerted and effectuated through the use of some of the corporation's own officers. Now, this exhibit brings us to December, 1946, admittedly one year and a half later.

Now, let us see what has occurred between June 15, 1945, and December, 1946. Where is Mr. Curry, the president of this corporation? He is in Mr. Coulson's office. That is where he is employed. And what is his employment? Not as an attorney of Mr. Coulson's office; Mr. Curry is not an attorney. His employment in Mr. Coulson's office, as the document read to you specifically stated, was as the president of this corporation to do things for the defendant railroad company in connection with the effectuation of these very savings which we are now litigating the right of either of these parties to.

The Court: I do not think you need to labor that point. I have not heard in anything the other side has said any statement that denies the effect of this arrangement was to benefit the defendant corporation. The question in this case is: Was there a right to do it?

Mr. MacKinnon: That is the question. You are precisely [280] correct.

The Court: What difference does it make whether this attorney sent the letter? Of course, he knew that these steps were being taken to file these returns for the benefit of the railroad company. The only question is: Was there a right to do it?

Mr. MacKinnon: That is the question. Your Honor hits the nail right on the head. That is the only question in the case.

Mr. Levy: If I may disagree with you, I do not think your Honor hits the only question in the case. I think your Honor hits one of the questions in this case.

The Court: I think perhaps we are spending unnecessary time. I do not think this telegram is harmful in any way. It is merely a telegram by an attorney with respect to facts of which there is already some evidence.

Mr. Levy: It is not the statement of an attorney; it is a statement of Mr. Coulson, director of this railroad company.

The Court: You do not have to prove the kind of intent here that you have to prove in a criminal case. You do not have to show the facts that are already demonstrated, with which this man was dealing, and then in addition show that there was some conscious mental activity on his part evidenced by something that he said or did by which he recognized that that was the fact. The facts themselves demonstrate that. I do not think [281] it is of any importance. I think we are spending too much time about it.

Mr. MacKinnon: I do not think it is important except it is a clear demonstration of how far afield we are getting from the issue in the case, as, of course, as I said at the outset, they make the issues and we will have to meet them.

Mr. Adams: May I say one word, because I started this discussion. I only arose with the thought in mind that perhaps you could get some limit as to the things we will have to explore, because they are thrown forward by our adversaries, and it occurred to me perhaps a sensible limit would be to say that once this plaintiff corporation, through interveners and through its own counsel, voiced this claim and had its lawsuit and were actively looking after it, that that might be a time when we should stop the examination into what was done. Up to that time these gentlemen, I understand, had the contention here that something was taken from the corporation without its knowledge, while, as Mr. Phleger says, it was in a coma. Certainly at the time they filed the lawsuit and made the claim the knowledge was there and the coma was ended and it occurred to me that perhaps that might be a reasonable way of putting some limit on what should be brought before your Honor. But it is only a suggestion I arose to make in that connection.

Mr. Phleger: Perhaps I should correct counsel's characterization of plaintiff's case. We take the position, your Honor, [282] not only that there arose a right in us when our property was taken and the

handling of the income tax matter was taken over by the defendant corporation, but we say that when all of those acts took place the plaintiff corporation, by virtue of the fact that all its active officers were acting in dual capacities should not be charged for lack of action, with making of gifts, or any of these other matters which defendants are raising as defenses, and they bear also directly upon the equities. We want to prove, beyond peradventure, that this defendant took over and handled these tax matters and dealt with plaintiff's property, as a result of which it was unjustly enriched, and the fact that the active officers and the people who were purporting to represent the plaintiff corporation were at this time in the employ and in the pay of the defendant corporation is a very important part of this case, and this wire shows that the chief actor on the part of the defendant knew that fact.

The Court: I think the evidence otherwise may show that.

Mr. Phleger: I agree this is accumulative.

The Court: I do not think that this is too important, this document. I will allow it to be admitted in evidence subject to a motion to strike if at some future time in the case the importance of it may assume greater proportions.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 66.) [283]

Mr. MacKinnon: I do not think, your Honor, it will ever assume importance. The only point I want

to emphasize is that they are embarking on an unlimited field and we will have to meet it. That is all. We will have to put in the full facts. They say they are dealing in equities. They have selected documents and we will have to meet them. We have no alternative.

The Court: We can't help that. I think perhaps we will take a brief recess at this time.

(Recess.)

Mr. Phleger: Mr. Curry, will you take the stand, please?

MICHAEL J. CURRY

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court?

A. Michael J. Curry, 10 Perth Ave., New Rochelle, New York.

Direct Examination

By Mr. Phleger:

Q. Mr. Curry, what is your occupation?

A. I am a retired railroad official.

Q. Did you know Mr. Schumacher in his lifetime?

A. During his lifetime, yes. I have known him since 1914.

Q. Will you very briefly state to the Court how you met him? And generally your relations with him during his lifetime?

A. I met him in 1914. At that time I was with

(Testimony of Michael J. Curry.)

the Chicago, Rock Island and Pacific Railway, in Chicago, Illinois, and Mr. J. E. Gorman, was president of the Rock Island at that time. [284] He was the brother-in-law of Mr. Schumacher. He had stated to Mr. Gorman that he was looking for a secretary to come to New York, and Mr. Gorman suggested that I might be willing to come with him. So he conferred with me, and I agreed to come as Mr. Schumacher's secretary.

At that time he, Mr. Schumacher, was Chairman of the Board of the Rock Island and Vice President of the El Paso and Southwestern Railroads. I remained with Mr. Schumacher from that time up to his death in February, 1948, in various capacities as secretary and assistant to the president of the El Paso and Southwestern, and as his chief clerk when he became executive vice-president of the Southern Pacific, at the time of the sale of the El Paso and Southwestern to the Southern Pacific. At that time Mr. Schumacher and I went over to the Southern Pacific.

After about four or five months Mr. Schumacher was directed to go to Chicago and organize a traffic agency, a so-called off-line traffic agency. That was an agency in charge of all the traffic soliciting agencies that were not located on the line of the Southern Pacific.

I stayed with Mr. Schumacher in Chicago while he left Chicago in July, 1926, and I remained in Chicago as office manager of the traffic agency.

(Testimony of Michael J. Curry.)

About a year later he contacted me again and asked me if I would care to come back to New York as officer of the railroad company and corporation.

Q. That is the Western Pacific Railroad?

A. The Western Pacific Railroad Company and Western Pacific Railroad Corporation, which I agreed to do, and I came to New York and took those positions on April 1, 1927.

Q. From that date forward up until the last year or so you have been continuously connected with those companies?

A. Yes, I have been.

Q. And connected with Mr. Schumacher until his death?

A. Yes, sir.

Q. When did Mr. Schumacher die?

A. He died February 26, 1948.

Q. Can you state generally what the nature of your services were while you were serving with Mr. Schumacher?

Mr. MacKinnon: That, your Honor, I object to on the ground the by-laws of the corporation are the best evidence of the duties of the officers.

The Court: I think he wants to know what offices he held.

Mr. MacKinnon: That is all in evidence here. It is prepared in the schedule.

Mr. Phleger: Your Honor, I want to establish the general nature of the functions of this witness in order that your Honor may have some general idea of his capacity and of the manner in which he conducted the various positions which he held.

(Testimony of Michael J. Curry.)

Mr. MacKinnon: My response is to that, your Honor, the by-laws provide what the duties of the officers are. [286]

Mr. Phleger: Do they provide what the duties are of a stenographer to Mr. Schumacher?

Mr. MacKinnon: They provide what the duties are, your Honor, when he came back to the company-corporation.

The Court: I will overrule the objection, unless this is something lately.

Mr. Phleger: No, this is preliminary.

The Witness: The question, please?

The Court: What was the general nature of your work with Mr. Schumacher with both companies?

A. Generally my duties were those of a chief clerk or an office manager. Mr. Schumacher gave me to understand on many occasions that he was the boss of that office, both the company and the corporation.

Mr. MacKinnon: That, I submit, your Honor, is not responsive. I move to strike it out.

The Court: Yes, what Mr. Schumacher gave him to understand may go out.

The Witness: Well, as to the duties, they were generally those of a chief clerk or an office manager. I had a number of titles but no authority.

Mr. MacKinnon: That, your Honor, I object to on the ground that the by-laws of the corporation specify the authority. No matter what anybody

(Testimony of Michael J. Curry.)

said to him, the by-laws provide what the duties of the officers are. [287]

The Court: Yes, but the witness can testify to what he did.

Mr. McKinnon: Yes, but the protestations of the witness——

The Court: Yes, his statement that he had no authority may go out.

The Witness: May I say here——

The Court: Wait just a minute, Mr. Curry. What is it that you want to bring out? The actual functions performed by the witness.

Mr. Phleger: Yes, and I will proceed to do that, your Honor.

The Court: I think you had better ask the question.

Q. (By Mr. Phleger): When did you first become an officer of the Western Pacific Railroad Company? A. In April, 1927.

Q. And what position did you assume at that time?

A. I was appointed vice-president, assistant secretary and assistant treasurer.

Q. And at whose suggestion?

A. At Mr. Schumacher's suggestion.

Q. When did you first become an officer of the Western Pacific Railroad Corporation?

A. On or about that time I was appointed secretary and treasurer of the corporation.

Q. At whose instance?

(Testimony of Michael J. Curry.)

A. At Mr. Schumacher's recommendation. [288]

Q. Will you describe generally what you did as an officer of the Western Pacific Railroad Company?

A. Well, I performed the duties of secretary and treasurer as prescribed under the by-laws.

Q. My question is, of the Western Pacific Railroad Company?

A. Oh, the company. Vice-president, assistant secretary and assistant treasurer. I was merely a signing officer with that title. I had no authority. The by-laws of the railroad company provided that one or more vice-presidents could be appointed or elected and their duties delegated from time to time and authorized at various times to execute papers and documents of various kinds.

Q. Did you execute papers in behalf of defendant company? A. I did.

Q. Many papers? A. I would say yes.

Q. What was the general course of procedure in connection with your execution of papers for the defendant company?

Mr. Adams: Objection, your Honor, on the score of characterization. So that it may be clear, and I won't make the objection again, are these questions addressed to the time that Mr. Phleger refers to as the time when the defendant was the debtor in reorganization or prior to that time?

Mr. Phleger: It covers the entire period during which he held those titles with the company. [289]

Mr. Clark: Commencing in 1927.

(Testimony of Michael J. Curry.)

Mr. Adams: As long as we are clear about the fact that is being addressed to the witness and you are not making any particular reference as to the first four months of the year 1945. Is that clear? You are asking the witness generally over the whole period?

Mr. Phleger: That is correct.

Mr. Adams: Very well.

The Witness: The question?

(Question read by the reporter.)

A. I was instructed by either Mr. Elsey, the president, or Mr. Schumacher, the chairman, to execute such documents under the authority of the Board of Directors and under their direction.

The Court: What you mean is you signed whatever documents they told you to sign?

A. Yes, sir. Yes, your Honor.

Q. (By Mr. Phleger): Did you prepare the documents you signed?

A. I did not. I do not think that I would have ever been allowed to sign any documents that I prepared.

Mr. MacKinnon: I move to strike out everything after "I did not".

The Court: Yes. [290]

* * *

Q. (By Mr. Phleger): This question will be of particular interest to counsel. When did you become an officer of the Western Realty Company?

(Testimony of Michael J. Curry.)

A. I think some time in 1927 or 1928.

Q. What position did you hold?

A. Assistant Treasurer.

Q. At whose instance were you appointed to that position? A. Mr. Schumacher's.

Mr. Clark: Mr. Phleger, may I suggest that you put in the schedule which was identified on the deposition of the Western Realty officers and their tenures?

Mr. Phleger: I have no objection.

Mr. Clark: It is agreed to and it establishes the length of time Mr. Curry was an officer.

Mr. Phleger: That is intervenor's exhibit 200 and would be plaintiff's exhibit 67. It is a schedule of the officers of the Western Realty Company.

(Schedule of officers of Western Realty Company was thereupon received in evidence and marked Plaintiff's Exhibit 67.)

Q. (By Mr. Phleger): Where were the officers of the Western Pacific Railroad Corporation and Company in New York?

A. They were at 37 Wall Street.

Q. Were the same offices occupied by both companies? [291] A. Yes, sir.

Q. Were there employees in those offices of both companies? A. Yes, sir.

Q. Were the people who worked in those offices employees of both companies?

A. They were.

Q. How were the expenses of that office paid?

(Testimony of Michael J. Curry.)

Mr. Adams: At what period of time, Mr. Phleger?

Mr. Phleger: During the entire period.

The Witness: For some time after I came there they were divided fifty-fifty between the two companies and later on, the percentages varied.

Q. Can you fix the date up to which they were paid one-half by each?

A. I think it was up to the year 1934.

Q. And thereafter and up to June 1, 1943, how were the expenses divided? [292]

* * *

A. As I stated, the percentages after 1934 varied. They were 75 and 25 and 66 and $\frac{2}{3}$ and 33 and $\frac{1}{3}$ until June 1, 1943, when the railroad company took over the entire expense of the New York office.

Q. (By Mr. Phleger): How long was the entire, or for what period was the entire expense of the New York office borne by the railroad company?

A. From June 1, 1943, to May 1, 1945.

Q. And what happened then?

A. The office was closed.

Q. When did you become president of the Western Pacific Railroad Corporation?

A. On February 1, 1942.

Q. At whose instance?

A. Mr. Schumacher's.

Q. Was anything said to you at that time as to the reason for Mr. Schumacher's retirement and your election? [293]

(Testimony of Michael J. Curry.)

A. Yes, Mr. Schumacher was impaired somewhat physically and besides we wanted to reduce the expenses of the corporation.

Mr. MacKinnon: If your Honor please, I submit he should respond and say what was said and who said it, and not enter into a dissertation each time he is asked a question.

The Witness: Well, Mr. Schumacher said to me at this time that he would resign and he felt that I should take over the presidency and see the corporation through its liquidation and dissolution. That is what he told me at the time.

Q. (By Mr. Phleger): Did he say anything about expense?

A. Yes. His resignation—his salary went with it. He gave up his salary of \$15,000 a year.

Q. And what did they do with your salary?

A. Well, as I recall it, I was getting \$4,500 a year as secretary and treasurer, and I think for a short time after that I got \$1,000 additional, I believe it was, to act as president and treasurer.

Q. How long did your salary as the chief executive of the corporation continue?

A. I received no compensation from the corporation since June 1, 1943.

Q. That is the date on which you say all of the office expenses of the New York office were taken over by the defendant company?

A. Correct.

Q. Your salary stopped then from the corpora-

(Testimony of Michael J. Curry.)

tion, and have you [294] received any compensation from it since? A. I have not.

Q. As to your duties as president of the corporation, who prepared the minutes of the corporate meetings after you became president?

A. Well, I prepared the agenda and the minutes.

Mr. MacKinnon: That I object to because——

The Witness: I did.

Q. (By Mr. Phleger): You attended the directors' meetings, did you? A. I did.

Q. Did you engage in any discussions of policy matters personally in the directors' meetings?

A. I did not.

Mr. MacKinnon: I object to that as calling for a conclusion. The form of the question is completely bad: Did he engage in policy discussions?

Mr. Phleger: I do not see that that is objectionable, your Honor. It does not call for any conclusions.

The Court: What is bothering you about that? What "policy" means?

Mr. MacKinnon: That is right.

Mr. Phleger: It will take a lot longer to ask the questions.

The Court: What are you trying to show, that the president was just a presiding officer and a sort of figurehead? [295]

Mr. Phleger: That is correct.

The Court: Do you admit that that is so?

(Testimony of Michael J. Curry.)

A. I admit that that is so.

The Court: Ask him another question.

Q. (By Mr. Phleger): Who were the joint employees at the New York office during the period of 1943 through the date when it closed? Was Mr. Schumacher there?

A. Mr. Schumacher was there, but he was a trustee and paid, I believe, by the trustee.

Q. There was yourself—— A. Myself.

Q. Miss Valouch—who is she?

A. Miss Valouch was Mr. Schumacher's secretary, personal secretary, and in addition handled our tax matters for us and did some of my secretarial work.

Q. Who is Sheehan?

A. Mrs. Sheehan was the telephone operator, receptionist, and of the files, and assisted the other clerks generally in their work; also helping out in the transfer work that Mr. Wienken was handling.

Q. The chart shows that she was a director of the corporation. Do you know at whose instance she became a director?

A. At Mr. Schumacher's recommendation.

Q. And there was also that Miss Valouch became a director of the corporation. Do you know at whose instance she became a director?

A. At Mr. Schumacher's instance. [296]

Q. Mr. Wienken—who is he?

A. Mr. Wienken for a time was my secretary and later became secretary of the corporation and con-

(Testimony of Michael J. Curry.)

tinued to handle my secretarial work, such as typing letters and telegrams and memoranda, and took over the transfer work from the Chase National Bank, who was the transfer agent for the stock of the corporation.

Q. I notice that he became secretary and director of the corporation, secretary in 1945 and director in 1946; do you know at whose instance?

A. Mr. Schumacher's.

Q. This chart described Mr. Weinken as a stenographer. There was some question as to that designation. Was he a stenographer?

A. He was a stenographer.

Q. Pierce and Greer were the attorneys, were they, in New York for the company and for the corporation?

A. They were.

Q. Mr. Osborn—he was a director of the corporation, was he?

A. Yes, sir.

Q. And also of the company?

A. Yes, sir.

Q. Who was Mr. Hatton?

A. Mr. Hatton was assistant secretary and assistant treasurer of the Denver & Rio Grande Western Railroad. We gave him office space in our suite at 37 Wall Street, desk room only. He was the transfer agent for the preferred stock of the Denver & Rio [297] Grande. He was not connected at all with the railroad—the Western Pacific Railroad Company or the Western Pacific Corporation.

Q. I notice that he became a director or was a director of plaintiff corporation. Do you know at whose instance he became a director?

(Testimony of Michael J. Curry.)

A. Mr. Schumacher's. [297-A]

* * *

Mr. Adams: Your Honor, at this time I desire to report with reference to the request made yesterday by counsel for the production of any letter accompanying Plaintiff's Exhibit No. 42, the latest of the lawyers' bills. That request was made to me during the session yesterday. In compliance with that request I have produced and have exhibited to counsel and will hand to him a letter from Mr. Polk to Mr. Elsey, of November 15, 1948. And since the letter last mentioned refers to the letter of December 19, 1947, I have also exhibited to counsel and am now handing to counsel the letter of December 19, 1947. And at this time, your Honor, I take it that the objections stated yesterday with reference to the bills may be deemed to apply to the production of the papers just mentioned.

The Court: Very well.

Mr. MacKinnon: May the record also contain a notation to the same effect on the behalf of defendant Western Realty Company?

The Court: Very well. [298]

* * *

Mr. Phleger: I think, may it please the Court, that it would be desirable to attach these two letters to Plaintiff's Exhibit No. 42 now in evidence, and because of the importance of the letters, I will im-

(Testimony of Michael J. Curry.)

pose upon your time sufficient to read all or portions of them. The first——

Mr. Adams: It may be understood, your Honor, that an objection has been registered on our part to the offer of these documents, as not relevant or material to any issue in the case.

The Court: Very well. [301]

* * *

(Letter of December 19, 1947, Polk to Elsey, and letter of November 15, 1948, Polk to Elsey, were incorporated in Plaintiff's Exhibit 42.)

MICHAEL J. CURRY

resumed.

Direct Examination

(Continued)

By Mr. Phleger:

Q. As to the employees in the office at 37 Wall Street, who instructed them as to their duties?

A. I did.

Q. I think you have testified as to who did that. Now, after the Western Pacific Railroad Company took over the entire payroll, was there any physical change in the manner of conducting the office?

Mr. MacKinnon: I object to the form of the question on the ground that it mischaracterizes the

(Testimony of Michael J. Curry.)

evidence. There is no [306] evidence that the Western Pacific Railroad took over the entire office. It was the trustees. There is no foundation for the question. The reorganization trustees were operating the property at June, 1943, when the office was taken over. It was their function and their function alone, and there are exhibits which demonstrate that fact.

The Court: I think the Court can take note of that. I do not think the question is worded with the idea of proving that fact, but merely for the purpose of making a differentiation between two organizations.

* * *

Q. (By Mr. Phleger): Will you answer the question? A. There was no change.

Q. No physical change? Was there any change in duties that were performed by the persons who worked there? A. None whatever.

Q. It went on just as before?

A. Just as before, yes, sir.

Q. When was the office at 37 Wall Street closed?

A. April 30, 1945.

Q. Who directed the closing?

A. The president of the railroad company, Mr. Elsey.



(Testimony of Michael J. Curry.)

Q. Where did you go after the office was closed?

A. Well, I remained at 37 Wall Street to clean up some various [307] matters, and on June 1 I went over to the suite of Whitman, Ransom, Coulson & Goetz at 40 Wall Street.

Q. That was across the street?

A. Across the street, yes, sir.

Q. Who gave you the instructions to go to the Coulson office?

A. Mr. Coulson talked with me and said that I was to come over there June 1 or as soon as convenient, and that he would provide a room for me.

Q. Do you remember receiving a letter from Mr. Coulson stating that you would be retained as an independent contractor?

A. I do.

Q. I show you Plaintiff's Exhibit 33, a letter from Robert E. Coulson to yourself, June 6, 1945. That letter was received by you, was it?

A. Yes, sir.

Q. Was that the first indication you had of the amount of the retainer that was to be paid to you?

Mr. MacKinnon: Just a minute, your Honor. I object to the form of the question. I think the question is clearly bad.

The Court: I will overrule the objection.

A. Yes, the first information I had definitely of the amount.

Q. (By Mr. Phleger): Had you had any previous discussion about going over to the Coulson office?

A. It is my recollection that Colonel Coulson

(Testimony of Michael J. Curry.)

asked me to come over to his office a few days prior to the writing of that letter, [308] and he informed me of this arrangement. But at that time I do not recall that he stated any figure.

Q. Now, after the office closed what became of the other employees? Let me first mention Miss Valouch. What happened to her?

A. Miss Valouch went over to the firm of Whitman, Ransom, Coulson & Goetz on May 1, 1945.

Q. Is she still there?

A. She is still there, to the best of my knowledge.

Q. How about Mrs. Sheehan?

A. Mrs. Catherine Sheehan, yes. She elected to take her severance pay and seek a job somewhere else.

Mr. Clark: May we have a stipulation on the amount of the severance pay at this time, your Honor?

The Court: Is it important?

Mr. Adams: The fact is of record now.

Mr. Clark: I do not think it is.

Mr. Adams: You asked us for the amount and we gave it to you.

Mr. Clark: It has not been put in.

Mr. Adams: I think it has.

Mr. Clark: Will you concede that those employees who did not continue with the company, or in Mr. Curry's case, who did not get a pension from the company, received six months' severance pay from the railroad company? [309]

(Testimony of Michael J. Curry.)

Mr. Adams: Mr. Clark, whatever the fact is. I think you are right. I am a little uncertain about the precision of your statement. I am sure, however, that we furnished you all that information. You have it readily at hand and we have no objection to it being put in evidence.

Q. (By Mr. Phleger): What happened to Mr. Wienken?

A. Mr. Wienken stayed with me until I moved over to the Whitman firm, and then he left the employment of the companies, and I believe moved to Texas or someplace.

Q. And how about Mr. Hatton?

A. Mr. Hatton retired as vice president—assistant secretary and assistant treasurer of the Denver, and was unemployed thereafter.

Q. Did your company salary stop when the office closed? A. It did. [310]

Q. Since that time have you been receiving a pension from the company?

A. I have, since May 1, 1945.

Q. In what amount?

A. At first it was \$89.45, but at the present time it is \$65.54 a month.

Q. What was the occasion for the reduction?

A. Well, the Railroad Retirement Board increased the maximum benefits under the Retirement Act 20%, and that would have brought my retirement pay up to \$140, and under the provisional retirement plan of the Western Pacific Rail-

(Testimony of Michael J. Curry.)

road Company, that was deducted, the amount of the increase, from what I was receiving from the company, and I now get \$65.54 a month.

Q. Is that a voluntary retirement plan?

A. It is a provisional retirement plan.

Q. It may be terminated?

A. It may be terminated at the will of the company or the board.

Q. Now when the office was closed at 37 Wall Street and you moved over to 40 Wall Street, where in 40 Wall Street, physically, was your office?

A. I was on the 52nd floor. The firm of Whitman, Ransom, Coulson and Goetz occupied the 51st and 52nd. I was on the 52nd floor in close proximity to Mr. James K. Polk's office, of tax counsel. [311]

Q. Well, how far was Mr. Polk's office from your office?

A. Oh, I would say it's 30 or 40 feet.

Q. Now did Miss Valouch have an office in the Coulson office at the same time?

A. Yes, she had an office adjoining that of Mr. Polk's.

Q. And adjoining yours?

A. No, it was across the hall.

Q. Across the hall. What became of the files and records that had been at 37 Wall Street when the office was closed?

A. Well, Mr. Elsey sent Mr. Droit, the secre-

(Testimony of Michael J. Curry.)

tary of the railroad corporation, to confer with me as to the disposition of the files, and he designated certain files that should be sent to the headquarters in San Francisco, others to be turned over to the Whitman, Ransom, Coulson and Goetz firm as perhaps being useful in connection with tax matters. In addition, I had the corporation files, which were separate and distinct from these other files, and as well, the so-called trustees' files, the reorganization files. Those, of course, I understood, were in the custody of Mr. Schumacher, but he didn't want them to be taken to his house or anything to be done with them. He said, "Do with them as you please." And so the only thing I could do was to take them over there with me to the room that I had at 40 Wall Street. They remained there with me until some time later in 1946 or 7. I am not sure which.

Q. Now the tax files, the income tax files—where did they go? [312]

A. The tax files, which were also separated from our other files, were transferred to the office of Whitman, Ransom, Coulson and Goetz.

Q. And where were they kept?

A. They were kept on the 52nd floor, on which I was, and in which Mr. Polk and Miss Valouch also occupied.

Q. And in whose room?

A. They were in Miss Valouch's room.

Q. Where are those files now?

(Testimony of Michael J. Curry.)

A. They are at the present time in the custody of Mr. James K. Polk.

Q. You haven't those files?

A. I have nothing in my possession having to do with tax files.

Q. You went over to Mr. Coulson's office about May 1, 1945. How long did you remain in those offices?

A. As I stated a while ago, I went over there June 1, 1945, and remained there until September 10, 1948.

Q. How did you happen to leave?

A. Well, I was directed by Mr. Coulson who came to my office, to vacate the room as they wished to use it, to have one of their employees or partners use that room. That was on September 10, which was a Friday. I immediately arranged to transfer my belongings down to our counsel's office at 44 Wall Street, and they remained there until I was able to locate [313] space at the old address, 37 Wall Street.

Q. Did Mr. Coulson, when he came into your office on Friday, tell you when he wanted the room?

A. He did. He said he wanted it the following Monday.

Q. And you got out by Monday?

A. I was out before Friday, the close of business Friday.

Q. Did he give any reason for telling you to get out other than——

(Testimony of Michael J. Curry.)

A. Other than they wanted the space. Pardon me, he came to my office about noontime, around twelve o'clock and told me this, and then I came back to the office and hustled about and got the files over to Mr. Nicodeums' office that afternoon.

Q. How long did you continue to receive the payments from the Coulson firm?

A. Until December 31, 1948.

Q. Nothing has been paid by the Coulson firm to you since that date, is that correct?

A. That's correct.

Q. During the two and a half years that you were in Mr. Coulson's office, what duties, if any, did you perform for the Coulson firm?

A. Well, so far as duties under the retainer are concerned, the only services that I performed so far as I can remember was the signing of income tax returns and the power of attorney. [314]

Mr. MacKinnon: I move to strike out the answer, your Honor, because he couldn't do that on the basis of the retainer. He did it as president of the holding corporation. His testimony is completely inconsistent, legally, with the facts.

The Court: Well, is that a legal matter?

Mr. MacKinnon: That is a legal matter, but I want to point these things out, because your Honor will note that the witness is very zealous in making his answers.

The Court: Well, this is the retainer that there

(Testimony of Michael J. Curry.)

is evidence of in the form of document, isn't that right?

Mr. Clark: That's right.

Mr. Phleger: Correct. It seems to me it is entirely appropriate to ask him what he did in return for the payment of that retainer.

Q. (By Mr. Phleger): Did you perform any other services for Mr. Coulson?

A. Not for Mr. Coulson, no.

Q. For anyone else?

The Court: You mean you sat there for a couple of years or so and signed your name a few times?

A. That is about all, sir, except that I did carry on whatever necessary thing had to be done for the corporation, such as answering letters of stockholders, inquiries and other incidental things that didn't occupy much of my time, because the [315] corporation was a dying concern, I thought.

Q. (By Mr. Phleger): Where was the corporation's principal office following the closing of the office at 37 Wall Street?

A. The principal office was moved to 100 West 10th Street, Wilmington, Delaware.

Q. And what was that?

A. The corporation trust company.

Q. That was your official headquarters?

A. And they were also named the transfer agents for the stocks of the corporation.

Q. I think you have already testified, have you

(Testimony of Michael J. Curry.)

not, that during this period you had received no compensation from the corporation, that is, since June 1, 1943? A. Correct.

Q. About how many stockholders has the Western Pacific Railroad Corporation?

A. I would say approximately 4700.

Q. Do any of them live in the west?

A. Yes.

Q. How many?

A. Well, in California we have over a thousand stockholders, but the stock of the corporation is distributed among the 48 states of the Union.

Q. Now, Mr. Curry, did you ever prepare a tax return? A. No, sir. [316]

Q. For either the corporation or the company?

A. No, sir.

Q. Tax returns, however, were prepared in the office at 37 Wall Street, were they not?

A. They were.

Q. Who in that office worked on tax returns?

A. Miss Valouch.

Q. Did she have any assistance?

A. Yes, yes, whenever it *came to* file our return, she brought in the firm of Lybrand, Ross Bros. & Montgomery, consulted them, and between them they prepared the returns and placed them before me for signature.

Mr. Clark: This testimony is directed to what time, counsel?

Mr. Phleger: Just a moment, I will do that.

(Testimony of Michael J. Curry.)

Q. What period of time are you referring to in the testimony you have just given?

A. Up to the year 1942, as I recall.

Q. What, if anything, did Mr. Schumacher have to do with income tax returns? A. Nothing.

Q. What happened with respect to the preparation of the 1942 tax return, as distinguished from the tax returns for prior years?

A. Well, early in 1943, the firm of Whitman, Ransom, Coulson and Goetz were designated as the tax counsel of the corporation, [317] and the '42 returns were prepared by that firm or a member of that firm.

Q. Who told you that the Coulson firm was to advise with respect to and prepare the tax return?

A. Mr. Schumacher gave me that information, and I believe Mr. Nicodemus.

Q. I show you, Mr. Curry, Plaintiff's Exhibit 50 which is a letter dated May 20, 1943, signed by James K. Polk and addressed to you as vice president of the Western Pacific Railroad Company. (Handing to witness.) Do you recall receiving that letter? That is the so-called "paradox" letter. A. Yes, I do.

Q. Can you state what happened with the letter when you received it?

A. I read it, didn't thoroughly understand it—

Mr. MacKinnon: I move to strike that out, your Honor, on the ground it is not responsive. He was asked what he did with it.

(Testimony of Michael J. Curry.)

The Court: All right, that may go out. You read it and then what happened?

A. (Continuing): After reading it, I marked it over to Mr. Schumacher to note, which he did, and he marked thereon in his blue pencil, "An interesting letter." He handed it to me and suggested I should give a copy to Mr. Nicodemus, our counsel, which I did. [318]

Q. (By Mr. Phleger): Who was Frank L. Reilly.

A. I know nothing about him, except that he was engaged by the Whitman, Ransom, Coulson and Goetz firm to help out in tax matters, federal tax matters.

Q. Well, when did you first meet him?

A. Well, he came to the office at 37 Wall Street, I think, early in 1943, and Miss Valouch introduced me to him and said that he was to work on the income tax returns, and we provided space for him in the board room, and he was there off and on for some time. He and Miss Valouch prepared the tax returns.

Q. Who was James K. Polk?

A. Mr. James K. Polk was a partner in the firm of Whitman, Ransom, Coulson and Goetz.

Q. Did you see him from time to time in connection with tax matters?

A. I saw him from time to time, yes, but it was only casually. I didn't consult him on tax matters.

Q. Did you have extensive conversations with him? A. No, I did not.

(Testimony of Michael J. Curry.)

Q. Who was Robert E. Coulson?

A. Mr. Robert E. Coulson is also a member of the firm of Whitman, Ransom, Coulson and Goetz.

Q. Did he come to 37 Wall Street at all in connection with these tax returns? [319]

A. Not to my knowledge.

Q. Did you ever discuss the matter of these tax returns with him? A. I did not.

Q. I will now direct your attention to the signing and filing of the 1942 tax returns. Who prepared those returns?

A. Those returns were prepared, I understand, under the supervision of Mr. James K. Polk by Miss Valouch.

Mr. MacKinnon: Your Honor, I object to the witness' testimony, if he says he understood. If he doesn't know, he can't make a responsive answer.

The Witness: I will change the answer to "under the supervision of Mr. Polk."

Q. (By Mr. Phleger): Did you have anything to do with their preparation?

A. Nothing whatever.

Q. When did you first see them?

A. I saw them when they were placed before me, I think it was in May, 1943. They were placed before me for signature in behalf of the corporation.

Q. Who presented them to you?

A. Miss Valouch.

(Testimony of Michael J. Curry.)

Q. What did she say, if anything?

A. I asked her if they were O.K. or all right and had Mr. Polk's approval, and she said, "Yes." I then signed them. [320]

Q. Did you consult the Board of Directors or any officers of the railroad corporation prior to signing the '42 returns as to whether or not you should sign them?

A. No, I did not.

Q. Did Mr. Reilly, Mr. Polk, or anyone else advise you prior to signing the 1942 returns that the railroad corporation didn't have to sign them unless it wanted to?

A. No, sir.

Q. Do you remember the circumstances surrounding the signing of the 1943 returns?

A. Yes.

Q. Do you know who prepared them?

A. They were prepared in the office of Mr. Polk, the tax counsel, and the figures, schedules, were assembled by Miss Valouch.

Q. Did you assist in their preparation?

A. I did not.

Q. By the way, Mr. Curry, did you keep the books or have anything to do with the books in 37 Wall Street?

Mr. MacKinnon: May I inquire as to the time, your Honor?

Q. (By Mr. Phleger): At any time.

A. I had nothing whatever to do with the book-keeping.

Q. Are you a bookkeeper?

(Testimony of Michael J. Curry.)

A. I am not.

Q. Did you ever make any entries upon books?

A. I never put pen or pencil to any book of the corporation. I depended entirely on the employee who was delegated that work.

Q. What are the circumstances surrounding your signing of the 1943 return?

A. The circumstances were similar to the previous years. The returns were placed to me in complete form by Miss Valouch. I asked her the same questions, if Mr. Polk approved them. She said, "Yes" and I signed them.

Q. Did you examine the schedules attached to the 1943 returns?

A. I did not. I merely looked over the copy—the original—the first sheet where the computations were down to the net or the taxable figure, and that was as far as I went.

Q. That is the sheet upon which you affixed your signature, is it not? A. Correct.

Q. Did you consult the directors of the corporation or any of its officers as to whether or not you should sign that 1943 return before you signed it?

A. I did not.

Q. Were you advised prior to signing that return that the corporation need not file a consolidated return if it did not wish to?

A. I was not so advised.

Q. Were you given any advice in connection with the filing of that return by Mr. Coulson, Mr.

(Testimony of Michael J. Curry.)

Reilly, or any member of Mr. [322] Coulson's firm? A. I was not.

Mr. Adams: Just a moment. What kind of advice do you refer to? Written or oral?

Mr. Phleger: Any kind.

Mr. Adams: Do you exclude from your question the document you just exhibited to the witness?

Mr. Phleger: I do not consider that a letter of advice. If you do, we will have the answer amended.

Mr. Adams: Let us have the answer amended, because it shows on its face it is a full letter of advice and is addressed to Mr. Curry.

Mr. Clark: For a different year.

Mr. Adams: I thought the answer was general.

Mr. Phleger: It is.

The Court: You can take the witness on cross-examination.

Q. (By Mr. Phleger): I show you, Mr. Curry, Plaintiff's Exhibit No. 54, which is a letter on the Coulson letterhead dated January 11, 1944, addressed to Mr. Elsey advising with respect to the 1943 tax accruals, their reversal, and other matters. That is the so-called "opinion" letter. Did you receive a copy of that letter?

A. I did not.

Q. Did you ever see a copy of that letter?

A. I never did. [323]

Mr. Clark: Mr. Phleger, is that the January 11 opinion?

(Testimony of Michael J. Curry.)

Mr. Phleger: Yes.

Q. I direct your attention now to the signing and filing of the 1944 returns. Who prepared those returns?

A. Those were prepared in the office of Mr. Polk.

Q. Did you have anything to do with their preparation? A. I did not.

Q. What took place when you signed the returns?

A. It was placed before me by Miss Valouch and I inquired if it had Mr. Polk's approval, and she said it had, and it was all right to sign, and so I signed it.

Q. Did you examine the schedules attached to the return? A. No, I did not.

Q. Did you consult the directors or officers of the corporation prior to signing that return as to whether or not you should sign it?

A. I did not.

Q. Were you advised prior to the time that you signed it that the corporation need not file consolidated return if it did not choose to do so?

A. I was not so advised.

Q. Where were you when you signed the 1944 return?

A. I was at 40 Wall Street in the office of Whitman, Ransom, Coulson and Goetz.

Q. I show you, Mr. Curry, Plaintiff's Exhibit 6, which is a [333] claim for refund of taxes for

(Testimony of Michael J. Curry.)

the year 1942, signed by the Western Pacific Railroad Corporation, by yourself as president. You signed the original of that, did you not?

A. I did.

Q. What were the circumstances under which you signed it?

A. I was at 37 Wall Street at the time, and Miss Valouch placed it on my desk with the statement that it had Mr. Polk's approval and it was all right to sign, so I signed it.

Q. Did you have anything to do with its preparation? A. I did not.

Q. Did you consult any of the corporation's directors or officers prior to signing it as to whether you should sign it? A. I did not.

Q. Did you have anything to do with its preparation? A. I did not.

Q. I show you, Mr. Curry, Plaintiff's Exhibit 64, a letter dated May 31, 1946, on the letterhead of the Coulson firm, addressed to Mr. C. R. Krigbaum, internal revenue agent in charge, signed by Whitman, Ransom, Coulson and Goetz; that has been termed the first Krigbaum letter, your Honor. Did you ever see the original or a copy of that letter? A. No, sir.

Q. Were you ever advised that it had been sent?

A. No, sir.

Q. I now show you, Mr. Curry, Plaintiff's Exhibit 65, a power [325] of attorney of the Western Pacific Railroad Corporation dated June 26, 1946,

(Testimony of Michael J. Curry.)

running to James K. Polk and others. Do you recall having executed the original of that power of attorney? A. I do.

Q. At whose instance did you sign it?

A. At 40 Wall Street in the suite of Whitman, Ransom, Coulson and Goetz.

Q. Did you consult any of the directors or any officer of the corporation before you executed that power of attorney as to whether or not you should sign it?

A. I did not, as I depended entirely on our tax counsel for putting those things before us.

Mr. MacKinnon: I move to strike out everything after "I did not" as not responsive.

Mr. Phleger: It may go out as far as I am concerned.

The Court: It may go out.

Q. (By Mr. Phleger): Did you consult with anyone prior to signing that power of attorney?

A. Not to my knowledge.

Q. I now show you attachment to Plaintiff's Exhibit 7, a letter dated [326] February 11, 1947, addressed to the Hon. Joseph D. Nunan, Jr., Commissioner of Internal Revenue, Washington, D. C., signed by the Western Pacific Railroad Corporation, James K. Polk, Attorney in Fact. Was that letter ever shown to you previous to its being sent?

A. No, sir.

Q. Did you ever see a copy of it?

A. Some months later I did.

(Testimony of Michael J. Curry.)

Q. Can you recall the approximate date when you first saw a copy of that letter?

A. Well, it is my thought it was somewhere around April, some time in April.

Q. That is April of 1947? A. Yes, sir.

The Court: I am confused there. Exhibit 7—

Mr. Phleger: That is attached to the stipulation, your Honor.

The Court: Oh, I see. There was the stipulation that was entered into in September, 1947.

Mr. Phleger: Yes.

Q. I show you now letter purporting to be signed by you dated April 4, 1947, addressed to Pierce & Greer. Do you remember sending that letter? A. Yes, sir.

Mr. Phleger: Your Honor, I offer in evidence as Plaintiff's [327] Exhibit 68 documents which have been identified as intervener's 41A, 41B, C, D, E, and F.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 68.)

Mr. Phleger: The first sheet is the letter I have just referred to. It is addressed to Mr. Nicodemus by Mr. Curry and states:

“Herewith copy of letter dated April 2, 1947, and enclosure from Mr. James K. Polk in regard to the corporation's federal income taxes for the years 1942, 1943, and the period January 1 to April

(Testimony of Michael J. Curry.)

30, 1944. A copy is also being sent to Mr. A. Perry Osborn. This will be presented to the board at a meeting called for next Tuesday, the 8th, for consideration and such action as the board may direct.

“Enclosure copy to Mr. A. Perry Osborn.”

The enclosed letter, the next sheet, is on the letterhead of the Coulson firm, signed by James K. Polk, dated April 2, 1947, and addressed to Mr. Michael J. Curry, President, the Western Pacific Railroad Corporation, Room 5205 Wall Street, New York, New York.

Q. That was the number of the room occupied by you, was it not?

A. 5205 at that time, yes, at 40 Wall Street.

Q. And that was a couple of doors away from Mr. Polk's office, [328] who signed it?

A. Yes, sir.

Mr. Phleger: It says:

“Dear Mr. Curry:

“As you doubtless know, Internal Revenue Agent Thomas Leahy has been conducting an examination of the operations of the Western Pacific Railroad Corporation and its affiliated companies for the calendar years 1942 and 1943 and the period from January 1 to April 30, 1944. His activities in this connection seem to be approaching completion. I have thoroughly covered with him all phases of the matter and this report is being made to you so that you may be advised of its current status.

(Testimony of Michael J. Curry.)

“In the course of his examination, Revenue Agent Leahy originally determined on a tentative basis that the worthlessness of the stock of the Western Pacific Railroad Company occurred in the year 1940. Although in view of the intermediate status of the matter no formal advice or notice of a proposed deficiency had been or could then be received, our tentative computations indicated that the deficiencies that would be asserted on the basis of any such determination as to the year of loss, would be considerably in excess of any reserve provision heretofore made against such tax [329] liability. We immediately took the matter up with the local office of the internal revenue agent in charge, and various conferences were held at which were presented the taxpayer's views that this loss occurred in the year 1943.

“The matter was submitted by the internal revenue agent in charge to the Office of the Commissioner of Internal Revenue in Washington, D. C., for advice. Conferences were held with bureau officials in Washington in connection therewith. It was first proposed by the bureau officials at Washington to support the tentative determination of the field examiner that the stock became worthless in 1940. In further conferences in Washington it was suggested that the matter was one appropriate for disposition by settlement or agreement between the parties. At the request of the Commissioner's Office, a written proposal as a basis

(Testimony of Michael J. Curry.)

for settlement was made by me as attorney in fact under date of February 11, 1947, copy of which I am enclosing."

Q. That was the Nunan letter I have just shown you, was it not? A. It was.

Q. And this is the first notice that you had that it had been sent, February? A. That is right.

Q. This letter being April? [330]

A. Yes.

Mr. Phleger:

"After consideration by the bureau officials, the case was recently returned by them to the local office of the internal revenue agent in charge. Revenue Agent Leahy, whose investigation was to a large extent suspended during the pendency of the matter in Washington, has now resumed his activities and is, we believe, now in the process of completing the draft of his report. His conclusions, we are hopeful, are now in accord with a proposal submitted to the Washington officials.

"The proposal as to a possible basis for settlement is presently pending in the local office of the Internal revenue agent in charge and will continue in that status until final action thereon can be taken by the appropriate bureau officials. Under the bureau practice and the necessities of this particularly difficult case, there will probably be an interval of at least two months before an agreement can be reached with those who must approve it, if it is accepted. It can be revoked at any time prior to such

(Testimony of Michael J. Curry.)

acceptance and there will be ample time for consideration by you and your associates before definitive action is taken.

“If the government approves the proposed basis for settlement, it will be an unusually advantageous disposition [331] of the matter. The doubts as to the construction of the applicable Internal Revenue Code provisions are so real and the factual background so involved, that the government would certainly be fully justified in resisting our claim in its entirety, if complete recovery were to be sought for 1942 as well as avoidance of all liability for 1943 and the period ended April 30, 1944. We would then be compelled to pursue our rights even to the Supreme Court of the United States. In any such extended litigation, we would necessarily incur all of the risks usually attendant upon any litigation plus the inevitable bringing to bear on the problem, in behalf of the government, of a succession of fresh and ingenious minds, eager to establish full tax liability in a case involving such large sums. The determination of the year of worthlessness in a factual matter involving a risk of loss which in itself, in my carefully considered opinion, fully justifies the proposed basis of settlement. This is entirely apart from other serious defenses which would most certainly be asserted by the government, if it were to contest our position in the case.

“It is, therefore, my definite recommendation that in the event the government advises us of its

(Testimony of Michael J. Curry.)

willingness to close the matter on the basis suggested in the [332] attached proposal, that the matter be so disposed of as promptly as possible. You will, of course, be advised promptly of any definitive corporate action required from your corporation to that end. I cannot impress upon you too much the depth of my conviction as to the importance of moving promptly when and if opportunity arises to close this matter on the basis proposed. I am fortified in this by the years of my experience in the Bureau of Internal Revenue and my knowledge of the extreme sensitivity which attends the situation in the Bureau in any case of this magnitude.

“I will be glad to discuss this matter with you and your associates at any convenient time.”

Attached to it is the Nunan letter of February 11, 1947, already in evidence, which suggests as a basis of settlement waiver of the claim for refund for the year 1942 and closing of the 1943-1944 cases upon the basis of no tax to be paid.

The Court: How do you suppose they ever got the government to agree to this matter?

Mr. Phleger: I assume——

The Court: Do you think the young men were not so alert at this time?

Mr. Phleger: I assume it is because it is within the provisions of law and the regulations which entitled——

The Court: I am just wondering—it is not per-

(Testimony of Michael J. Curry.)

tinient to this [333] case—what was the reason why there was an abandonment of the claim for refund of the amount that was paid in 1942? I suppose that is a complicated matter.

Mr. Adams: Mr. Polk will be a witness. He handled the transaction, and I am sure he would be the man best qualified to tell your Honor the answer to all of these questions. But it is the fact, as I stated to your Honor, that something like a year and a half ago this matter came before the Bureau in the regular way, and the Bureau are the watchdogs of the treasury——

The Court: I am not complaining about it; I am just wondering how they were so successful.

Mr. Adams: I think we shall satisfy your Honor before this case is over that the Bureau did wisely and that all the suggestions held forward here in a general fashion of some enormous windfall are nothing but pure imagination.

The Court: I am not so sure about that.

Mr. Clark: I think probably the form of the settlement was a practical solution, your Honor, when we regard the distinction between 1942 and 1943-1944.

The Court: Maybe.

Q. (By Mr. Phleger): Mr. Curry, I show you now a letter purporting to be signed by you, addressed to Mr. James K. Polk, dated May 5, 1947. Is that your signature? A. Yes, it is.

Mr. Phleger: I offer as Plaintiff's exhibit No.

(Testimony of Michael J. Curry.)

69, otherwise [334] identified as intervener's exhibit 172, a letter from Mr. Curry to Mr. Polk, dated New York, May 5, 1947.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 69.)

Mr. Phleger:

"After the conference between the board committee dealing with corporation tax matters, and yourself, held in your office on April 15, we have further considered the questions involved and the points raised at the conference.

"We are prepared to recommend to the board the sending to you of a letter of general approval of the proposed tax settlement outlined in your letter to the corporation under date of April 2, signed by myself as president, with a copy of an authorizing resolution of the board.

"We will expect to be informed as to the progress of the negotiations and if there are any changes in the proposed settlement the corporation must be entirely free to reconsider its approval. [335]

"Although we wish to be entirely cooperative in this matter, the corporation finds itself embarrassed by the action of The Western Pacific Railroad Company in opposing judicial settlement of the allocations of tax benefits, if any, derived from the application of the capital losses of the corporation for the benefit of the group." and so on, "—about the litigation."

(Testimony of Michael J. Curry.)

I want particularly to call your attention to the fact that in this letter to Mr. Polk, Mr. Curry characterizes Mr. Polk as counsel for both the railroad company and the railroad corporation. I will offer that as Plaintiff's Exhibit 69.

Mr. Adams: May it be stipulated that copies of this letter went to Mr. Nicodemus, Mr. Osborn and Mr. Wood?

Q. (By Mr. Phleger): Did they?

Mr. Adams: Yes, it is so stated on the letter.

Mr. Phleger: I will now offer as Plaintiff's Exhibit 70 a letter otherwise identified as Interveners' 173, a letter from James K. Polk, on the letterhead of the Coulson firm, dated May 6, 1947, addressed to Mr. M. J. Curry, 40 Wall Street, Room 5205.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 70.)

"Dear Mr. Curry:

"This acknowledges your letter of May 5, as to the pending tax matters for the years 1942, 1943 and 1944, the Western Pacific group in which I act as tax counsel.

"Obviously, as your letter suggests, the only thing that I could do in connection with the possible stipulation between the various interested companies in connection with pending litigation between them as to allocation would be to 'use my good offices.' The use of my good offices would necessarily be limited to calling to the attention of the other members of the group the fact that I have impressed upon your

(Testimony of Michael J. Curry.)

group, namely, that there is a common interest in concluding promptly the proposed settlement which I have been negotiating with the Treasury Department. It would, in my judgment, be disastrous if controversy between members of the group which could properly await subsequent disposition should make impossible a settlement along the lines heretofore outlined to your group."

I take it that refers to his previous letter, in which he outlines just what settlement is proposed, and I think the balance of the letter is not important. The last paragraph reads:

"Naturally, I am at the disposition of you and your associates and of any other member of the corporate group as to the method of computing the settlement or any other information which will be helpful in ironing out such differences as may exist between members of the corporate group.

"In closing, however, let me emphasize again the vital element that this controversy as between the members of the corporate group shall not be allowed to interfere with an advantageous settlement with the Treasury Department, as to which there is clearly no conflict in interest."

Copies were sent to Mr. Nicodemus, Mr. A. P. Osborn, Mr. Willis D. Wood.

I will now offer as Plaintiff's Exhibit 71 a letter otherwise identified as Interveners' Exhibit 175. It is a letter on the letterhead of the Coulson firm, dated May 19, 1947, addressed to Mr. C. R. Krig-

(Testimony of Michael J. Curry.)

baum, Internal Revenue Agent in Charge, 225 Broadway, New York, New York.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 71.)

Mr. Phleger: To identify it from the earlier Krigbaum letter, I have referred to it as the "second Krigbaum letter." It is signed, "The Western Pacific Railroad Corporation, James K. Polk, Attorney in Fact," and contains in substance the same material that is contained in the Nunan letter of February.

Q. (By Mr. Phleger): I show you this document, Mr. Curry, and ask you if you ever saw it before it was written and dispatched (handing to witness.)

Mr. Adams: We would object to counsel's characterization, which we believe to be inadvertently erroneous, in so far as it is a statement that is substantially identical with the Nunan letter, but the documents will speak for themselves.

Mr. Phleger: Well, that is an inadvertence, if that isn't the fact. Let me look at it. This says:

"Reference is made to the conference held in your office May 6, with regard to the tax liabilities of The Western Pacific Railroad Corporation, and its affiliated companies, for the taxable years 1942, 1943, 1944.

"At this conference an agreed basis of settlement of the tax liabilities involved was reached and this letter contains the written undertaking of the taxpayers effectuating the settlement."

(Testimony of Michael J. Curry.)

Mr. Adams: You have now read enough to establish my point.

Mr. Phleger: I would like to read the rest of it.

“The taxpayer”——

and the taxpayer, as signed, is “The Western Pacific Railroad [339] Corporation”

“——on behalf of itself and its affiliated subsidiaries agrees to settle and determine the tax liability of said corporation for the taxable years '42, '43, and '44 in the amount shown on the returns as filed. This proposal of settlement accordingly relates to the consolidated returns filed for the calendar years 1942, 1943 and 1944, in which said return for 1944 The Western Pacific Railroad Corporation included then its subsidiaries for the period January 1, 1944 to April 30, 1944, during which period affiliation existed.

“This settlement does not relate to or affect the tax liability of the subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated.

“As part of the settlement, The Western Pacific Railroad Corporation, on behalf of itself and its affiliated subsidiaries, will, if this settlement is accepted, execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal Revenue for the purpose of effectuating the settlement. The settlement reached with your office is agreed to without prejudice, however, to the rights or claims of the

(Testimony of Michael J. Curry.)

parties in the event the settlement is not accepted by the Commissioner of Internal Revenue.

“Authority for settlement of the tax liabilities of the above-named taxpayers by the undersigning company is contained in power of attorney heretofore filed with your office.”

Q. (By Mr. Phleger): I think I asked you whether you had seen that letter before it was sent.

A. The Krigbaum letter?

Q. Yes. A. I did not.

Q. When did you first hear that it had been sent?

A. I never heard that it had been sent. This is the first time that I knew of it.

Q. Now, when did you hear that the offer contained in that letter had been accepted? [341]

A. I believe it was sometime in August, 1947.

Mr. Phleger: I have the Nunan letter here now, and I really don't see the difference between it and the second Krigbaum letter, but I suppose there is.

Q. (By Mr. Phleger): I show you an attachment to Plaintiff's Exhibit 7, which is the stipulation that was heretofore filed regarding the 1942 refund. There are two letters attached to it, both signed by E. I. McLarney, Deputy Commissioner. Do you recall when you saw those two letters (indicating to witness)?

A. Yes; it was sometime in August 1947.

The Court: Well, we will take the afternoon recess at this time.

(Recess.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Phleger): Mr. Curry, when did you first hear that the loss of the value of the corporation stock was being used in connection with income tax?

Mr. MacKinnon: Oh, that question, your Honor, is a question of "hear of it" when he saw it as well as hearing of it? You mean whether somebody told him? I am just asking for an explanation of the question.

Mr. Phleger: Well, either one or both, if you want.

Mr. Clark: Became aware.

A. I first learned of the actual writing off of the loss of the stock holdings of the corporation at the time that the 1943 return was placed before me and Miss Valouch stated that [342] the stock loss had been written off on that return.

Q. And you noticed, did you, on the first sheet of the return as to what the tax was?

A. I did.

Q. And what did that show?

A. Well, it showed, as I recall, approximately \$75,000,000.

Q. No, I mean as to the tax.

A. Oh, as to the tax. No tax to be paid.

Q. Yes.

Mr. Phleger: And I will offer as Plaintiff's Exhibit 72 a document otherwise identified as Interveners' Exhibits 167, 168 and 169. Now, the top sheet is a letter from Mr. Elsey on the letterhead of

(Testimony of Michael J. Curry.)

Western Pacific Railroad Company, under date of February 11, 1947, by air mail, addressed to James K. Polk, Esq., care of Carlton Hotel, Washington, D. C.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 72.)

Mr. Phleger: It reads as follows:

"Dear Mr. Polk:

"In order that you may have definite authorization from this company to proceed in connection with the pending controversy as to Federal income taxes for the years 1942, 1943 and 1944, as to which you hold power of attorney, I have today conferred with all available directors. All of [343] the directors I have been able to reach, constituting a majority of the directors, have concurred in the proposal that you submit in writing to the Commissioner of Internal Revenue a definite proposal that the three years, 1942, 1943 and 1944, be settled on the basis of no refund and no additional tax.

"We understand that the year 1944 is involved in this controversy so far as this company is concerned, only during the period of affiliation. That is, through April 30, 1944, and that for the balance of the year 1944, the taxes of this company will be determined on the basis of its separate return for that period, outside the affiliation."

Attached to it is a resolution of the board of directors of the defendant company authorizing the

(Testimony of Michael J. Curry.)

submission of the offer of settlement, which is contained in the Nunan letter.

Mr. Adams: The resolution was at a subsequent date, Mr. Phleger.

Mr. Phleger: Yes, the resolution was adopted at a meeting on the 4th day of March 1947. The Nunan letter, as I recall it, was written on February 12.

Mr. Adams: The 11th. [344]

* * *

Direct Examination For Interveners

By Mr. Clark:

Q. Now, Mr. Curry, you are still the president of the plaintiff corporation, are you not?

A. I am.

Q. And are you receiving any compensation from it at the present time? A. No, sir.

Q. Am I correct in stating that you have received no [345] compensation from the plaintiff since on or about June 1, 1943?

A. That is correct.

Q. You are, however, receiving a pension from the defendant railroad company? A. I am.

Q. And in addition to that, do you receive a pension under the Railroad Retirement Act?

A. I do.

Q. And up to the last of the year 1948 did you receive the payments called for by the so-called retainer letter from Mr. Coulson's firm, which is in evidence in this case? A. I did.

Q. Now, let me direct your attention to the period commencing March 15, 1943, to April 30, 1945.

(Testimony of Michael J. Curry.)

Do you have that period in mind? A. I have.

Q. On or about March 15, 1943, did you become aware of a decision by the Supreme Court of the United States in the Western Pacific reorganization? A. I did.

Q. And was that shortly after March 15 of 1943? A. Yes, sir.

* * *

Q. (By Mr. Clark): At that time did you arrive at the understanding that that decision had any effect upon the stock in the railroad company owned by the plaintiff corporation? A. Yes.

Q. And what was that, please?

A. Well, it meant that the stockholdings of the corporation and the unsecured indebtedness were wiped out.

Q. And was that your understanding shortly after March 15, 1943? A. It was.

Q. Now, let me direct your attention to the situation in the so-called New York office—you testified to in your examination in chief by Mr. Phleger, during the period commencing—withdraw that.

During the period I just called your attention to—— A. Yes.

Q. You have testified that you gave instructions to the rest of the employees, is that right?

A. Yes, I instructed them.

Q. All right. Did anyone give instructions to you? A. Yes.

Q. And who was that, please? [347]

(Testimony of Michael J. Curry.)

A. Mr. Schumacher.

Q. Now, am I correct in stating that the New York office during that period of time was also the office of Mr. Schumacher, as one of the reorganization trustees in the reorganization of the Western Pacific Railroad Company? A. It was.

Q. And during that period of time were you employed in any capacity by the reorganization trustees?

A. Well, it is rather difficult for me to say. I continued in my employment as previously. We all went along just the same, but whether I was employed by the agent for the trustees or the trustees, it is a legal question, and I don't know that I can answer it.

Q. All right. Do you remember the occasion of the company going into bankruptcy back in August of 1935? A. I do.

Q. And do I understand that from that time on you continued to perform the same functions in the office at 37 Wall Street that you had performed previous to the date of the bankruptcy?

A. That is correct. .

Q. I see.

* * *

Mr. MacKinnon: The questions are all leading, your Honor.

Q. (By Mr. Clark): Will you please state, Mr. Curry, whether [348] there was any difference in the functions performed by you personally in the

(Testimony of Michael J. Curry.)

37 Wall Street office prior to the reorganization proceedings instituted in August of '35 and thereafter? A. There was no change.

Q. All right. Now, coming back again to the period commencing March 15, 1943, will you please tell us very briefly what functions you did perform in the office?

A. Well, as I have testified, I always considered myself as a chief clerk or office manager.

Mr. MacKinnon: Your Honor, I move to strike that out.

Mr. Clark: It may go out, your Honor.

The Court: If he has already testified to it, what is the good of going over it again?

Mr. Clark: I don't think he has specifically. It is one question I wanted answered, to make sure the record is complete on it.

The Court: All right.

Mr. Clark: I will do my best not to duplicate anything that Mr. Phleger has gone into.

Q. Just tell us briefly what you did in the office.

A. Well, I supervised the employees and I was careful to watch things, the matters that were handed by Mr. Schumacher. He was not very alert in later years, and he——

Mr. MacKinnon: Now, your Honor, I move to strike that, [349] all these gratuitous remarks of the witness. He can respond to the questions.

Mr. Clark: It may go out.

A. And he depended upon me to see that papers

(Testimony of Michael J. Curry.)

that were going in and out of the office were brought to the attention of everybody that might be interested in them and that was one of my functions.

Q. Were you also the office manager?

A. Yes.

Q. And who was head of the office?

A. Mr. Schumacher.

Q. Now, let me direct your attention to Mr. W. W. Hatton, who I think you have told us was an official of the Denver and Rio Grande?

A. Yes.

Q. During this period of time. Would you state whether or not Mr. Schumacher, during that period of time, held any office with the Denver and Rio Grande?

Mr. MacKinnon: I submit, your Honor, it is not the best evidence.

Mr. Clark: If he knows.

A. That is between the period March 15, 1943—

Q. Up to the time the office closed on April 30, 1945.

A. He resigned from the Denver and Rio Grande Western, but I do not remember just when. I don't think he was an officer of the Denver during that period. [350]

Q. I say, had he been an officer of the Denver and Rio Grande? A. Yes.

Q. What position had he held?

(Testimony of Michael J. Curry.)

A. He held the position of Chairman of the Board or Chairman of the Executive Committee of the Denver and Rio Grande Western, and those positions were alternated between the two owners, the Western Pacific Railroad Corporation and the Missouri Pacific Railroad Company.

Q. And Mr. Schumacher held that position while Mr. Hatton held his position as Assistant Secretary? A. Yes.

Q. During this period, Mr. Curry, commencing March 15, 1943, and on up to the time the New York office closed on April 30, 1945, was there any segregation as between employees who performed services for the holding corporation and those who performed services for the railroad company?

A. There was no segregation.

Q. Was there any segregation of duties performed by any employees between those two companies? A. No.

Mr. Clark: May it please your Honor, we will offer in evidence as Interveners' Exhibit 3 a memorandum which on the deposition was marked Railroad Company Defendant's Exhibit 106-A, to which is attached a slip addressed to Mr. Polk by M. J. Curry dated March 16, 1943, marked on the deposition as Railroad Company's Defendant's 106-B, and we will offer them as one exhibit, Interveners' 3.

(Memorandum, Curry to Polk, March 16, 1943, was received in evidence and marked Interveners' Exhibit 3.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Clark:) Now, Mr. Curry, I show you the documents which have just been received in evidence, and you will note that the slip reads, "Mr. Polk, herewith extract from AAR weekly information letter as per phone conversation of date. M. J. Curry, 3/16/43." I will ask you whether you sent the document to which that slip was attached to Mr. Polk on March 16, 1943. You will note the memorandum to which that slip is attached is a release by the American Association of Railroads concerning a tax department ruling.

A. Yes, I have a recollection that I sent it over to Mr. Polk.

Q. In what capacity were you sending material of this sort to Mr. Polk on March 16, 1943?

A. Anything and everything that had to do with tax matters I handled that way. I referred them to either Miss Valouch or Mr. Polk.

Q. At that time, namely, March 16, 1943, did you regard Mr. Polk as tax counsel for the corporation?

A. At that time—it was early in 1943 that I believe they were appointed tax counsel.

Q. I am asking you why you sent this tax ruling to him. I [352] will withdraw that question.

At the time you sent the tax ruling, which is part of Interveners' Exhibit 3, to Mr. Polk did you regard him as tax counsel for the holding corporation?

A. I do not recall.

(Testimony of Michael J. Curry.)

Q. Did you regard him at that time as tax counsel for the company? A. Yes.

Q. Now, you testified in response to questions put to you by Mr. Phleger that sometime early in 1943 Mr. Schumacher had advised you that Mr. Polk was taking over the tax representation of the corporation? A. That is correct.

Q. Do you remember that testimony?

A. I do.

Q. Did Mr. Schumacher so advise you before or after the date of the slip attached to Interveners' Exhibit No. 3, namely, March 16, 1943?

A. I do not recall.

Mr. Clark: May I have Mr. Curry's deposition opened?

Q. Mr. Curry, you remember your deposition being taken in this case in New York in the spring of last year? A. I do.

Q. Namely, about March 23, 1948?

A. Yes, sir. [353]

Q. That is, it was on that day, part of it?

A. Yes.

Mr. Clark: Your Honor, I shall refer to page 2819 of Mr. Curry's deposition in this case, and just follow me, if you will, Mr. Curry:

“Q. Let me direct your attention, Mr. Curry, to Railroad Company Defendant's Exhibit 106-A and -B, which is a copy of an Internal Revenue ruling concerning depreciation accounting, upon which appears the note apparently addressed by you to Mr.

(Testimony of Michael J. Curry.)

Polk on March 16, 1943, and I will ask you to examine that document (handing it to the witness).

A. Yes.

Q. Do you remember having sent the original of Railroad Company Defendant's Exhibit 106-B over to Mr. Polk on or about March 16, 1943?

A. Yes.

Q. Do you remember why you sent it to him?

A. Yes.

Q. Why?

A. I read carefully these weekly letters from the Association of American Railroads and they covered various subjects of interest to railroad executives, and so forth. Anything I saw in there that had to do with tax matters, whether I understood them or not, I sent over to Mr. Polk as tax [354] counsel.

Q. Mr. Curry, at that time, namely, on March 16, 1943, was it your understanding that the firm of Whitman, Ransom, Coulson & Goetz and Mr. Polk as a partner of that firm had been retained as tax counsel for the Western Pacific Railroad Corporation?

A. It is my recollection they had.

Q. When was it, do you remember—withdrawn. Did you have any part in the retainer of Messrs. Whitman, Ransom, Coulson & Goetz and Mr. Polk as a member of that firm as tax counsel?

A. I did not.

Q. For either the corporation or the company?

A. Correct.

Q. Did you have anything whatsoever to do with it?

A. Nothing whatsoever.

(Testimony of Michael J. Curry.)

Q. At some time were you advised that Whitman, Ransom, Coulson & Goetz had been retained as tax counsel for either the corporation or the company?

A. It is my recollection that Mr. Schumacher advised me they had been.

Q. Do you remember about when that was with reference to March 16, 1943?

A. It must have been early in 1943. I cannot remember.

Mr. Adams: I move to strike out that portion of the [355] statement 'it must have been.' I ask the witness to state his best recollection if he has any.

Q. (By Mr. Clark): What is your best recollection?

A. My best recollection is early in 1943.

Q. In view of the note from you to Polk, which appears on Railroad Company Defendant's Exhibit 106-A, and to which I just directed your attention, Mr. Curry, is your recollection refreshed with respect to the approximate time that you were advised that Whitman, Ransom, Coulson & Goetz had been retained as tax counsel?

A. Yes

Q. Is it your recollection that you were so advised before or after March 16, 1943?

A. It is my recollection that it was before that date.

Q. Do you refer in that connection to your conversation with Mr. Schumacher to which you have just testified?

A. Yes.

(Testimony of Michael J. Curry.)

Q. Were you ever consulted with respect to the retainer of Whitman, Ransom, Coulson & Goetz as tax counsel? A. No."

Q. Do you remember, Mr. Curry, that I asked you those questions on deposition and you gave the answers I just read to you? A. I do.

Q. And are they correct? [356]

A. To my present knowledge they are.

Mr. Clark: May it please your Honor, we will offer in evidence as Interveners' Exhibit 4 a letter dated March 17, 1943, that is, it is a copy of a letter addressed to Mr. Robert E. Coulson, Whitman, Ranson, Coulson & Goetz, 40 Wall Street, New York, and bearing a stamp "Original signed Charles Elsey" and an endorsement that a copy went to Mr. T. M. Schumacher, which was marked on the depositions as Railroad Company Exhibit 306. And also we offer the notations in green pencil—in fact, all the handwritten notations on this document being in blue pencil, "M. J. C." and signed—I can't make it out—and then in green, "Discussed March 23, 1943, M.C.V. to attach to tax papers, M.J.C."

Is that a sign of any kind?

Mr. Adams: That is a check mark in green pencil drawn through the blue pencil lines.

Mr. Clark: That is all. I will accept that.

(The letter referred to was received in evidence and marked Interveners' Exhibit 4.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Clark): Mr. Curry, I show you the letter which has just been received in evidence as Interveners' Exhibit No. 4, and I want to direct your attention to the first paragraph and the sentence reading: "Dear Mr. Coulson"—this being from Mr. Elsey—"This will reply to your letter of March 1 relating to depreciation on way and structures and its [357] relation to income tax," and then to the markings in green pencil which appear on the heading "Discussed March 23, 1943, M.C.V. to attach to tax papers, M.J.C.," which is already conceded to be your signature. A. Yes.

Q. Those green markings were placed upon the document by you on March 23, 1943, were they not?

A. That is right.

Q. What does the word "Discussed" mean?

Mr. MacKinnon: I object to that, your Honor.

Mr. Clark: Withdraw that.

Q. Does the word "discussed" on that exhibit evidence the fact that you discussed that letter with someone?

Mr. MacKinnon: I object to the form of the question. It is clearly leading.

Mr. Clark: Submitted. Withdrawn.

Q. What was the occasion for your putting the word "Discussed" on the exhibit?

A. This is a copy of the said letter——

Mr. MacKinnon: Your Honor, I move to strike out the witness' response.

A. (Continuing): ——which Mr. Schumacher received.

(Testimony of Michael J. Curry.)

Mr. MacKinnon: He can make direct responses.

Mr. Clark: We do not care about that, your Honor. All I care about is an answer to my question. [358]

The Witness: Mr. Schumacher got this copy, marked it out to me, and questioned it, and it was my custom to take it in and talk these things over with him.

Q. (By Mr. Clark): That is not my question. Did you discuss it with anyone on March 23, 1943?

A. Well, my statement——

Mr. MacKinnon: I move to strike out the answer and get a responsive answer.

The Court: He wants to know after you got the letter, did you take it in and talk it over with Mr. Schumacher?

The Witness: That is all I can state. Mr. Schumacher got the copy, marked it out to me, I went in and we talked about it, and that is all there was to it. So I just marked it "Discussed," put the date on, and marked it over to Miss Valouch to put in the tax papers.

Q. (By Mr. Clark): Do you remember what the discussion was ?

A. I do not. I do not recall it at all.

Q. Was Mr. Nicodemus present for the discussion?

A. There is nothing on here to indicate that he was, and I do not recall that he was.

Q. Will you please hold that exhibit for a moment?

(Testimony of Michael J. Curry.)

Mr. Elkington, may I have Plaintiff's Exhibit 39-A?

Q. I want also to show you, Mr. Curry, a letter addressed to Mr. F. C. Nicodemus, Jr., Pierce & Greer, 40 Wall Street, New York, likewise dated March 23, 1943, and signed by Mr. [359] Schumacher.

Mr. Adams: Will you identify the exhibit?

Mr. Clark: I think I did identify it as Plaintiff's 39-A and on deposition Interveners' 6, in which appears this statement:

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942. The return filed is a tentative one, an extension having been granted until 15, 1943, to file a final return. As one of the trustees of the Western Pacific Railroad Company, I am looking to you to cooperate with Mr. Matthew, general counsel for the trustees, in protecting the trust estate in the preparation of the final return."

Q. Does the reference in there to the conversation refresh your recollection as to whether or not you discussed Interveners' Exhibit 4 on any occasion with Mr. Nicodemus present? A. No.

Q. About this date, March 23, 1943, had you had any discussion with Mr. Nicodemus concerning tax matters affecting the corporation?

A. Yes, I have a recollection that I talked with

(Testimony of Michael J. Curry.)

Mr. Nicodemus about the possibility of filing these consolidated returns, [360] and it was about that time that the firm of Whitman, Ransom, were named as tax counsel.

Q. Was it at this time, on March 23, 1943, or was it sometime prior to March 16, 1943?

A. I do not recall at the moment.

Q. Will you still please hold that letter, Mr. Curry. Can you tell us who prepared, that is, who dictated or drafted the letter signed by Mr. Schumacher which has been received in this case as Plaintiff's Exhibit 39-A addressed to Mr. Nicodemus?

A. Can I tell you who dictated it?

Q. Yes, sir.

A. No, I can't definitely. I have an idea.

Q. Let us have your idea.

Mr. MacKinnon: I object to his ideas, your Honor.

Q. (By Mr. Clark): Let me ask this question: Didn't Mr. Nicodemus himself prepare that letter addressed to himself for Mr. Schumacher's signature?

Mr. Adams: That is leading. Your Honor, I take it the interveners are leading their own witness in the examination.

Mr. Clark: He is not our witness, your Honor. We represent stockholders, and as I told your Honor in the opening statement, the chips are going to fall where they may in this case.

The Court: What is the importance of this?

(Testimony of Michael J. Curry.)

Mr. Clark: I simply want to develop the fact, your Honor, because I think the evidence indicates that Mr. Coulson, on the basis of the memorandum already in the record on March 15, when he makes inquiry about the situation in the office at 37 Wall Street, simply took over the tax situation, and that he took it over with the consent and through arrangement with Mr. Nicodemus, and that this letter, which was written for the record, purportedly coming from Mr. Schumacher to Mr. Nicodemus, was written by Mr. Nicodemus himself, and the answer prepared on the same day by Mr. Nicodemus and Mr. Coulson went to work on the tax returns without bothering to get the consent of one trustee, Sidney Ehrman, who was not even consulted until a later date.

The Court: What difference does it make whether it was prepared by Mr. Nicodemus?

Mr. Clark: It shows, if it please your Honor, who was in control of these corporations so far as the tax matters were concerned.

The Court: Nicodemus was the attorney for the company.

Mr. Clark: And also the attorney for the railroad company, also the attorney for the debtor.

The Court: He was the attorney for the company. Now, what difference does it make whether the attorney for the company or the president of the company wrote the letter?

Mr. Clark: Because Mr. Nicodemus was not only

(Testimony of Michael J. Curry.)

the attorney [362] for this corporation but the attorney for the railroad company.

The Court: I know that, but so was Mr. Schumacher in both companies at the time. I do not see any difference in whether the attorney wrote the letter or the officer wrote the letter.

Mr. Clark: Very well, we won't pursue that.

The Court: I mean, it does not seem to have any importance. Lots of times attorneys write these letters.

Mr. Clark: To themselves?

The Court: What difference does it make? That is what lawyers are for. They write the letter and the principal signs it, if they want to get it in the right legal form. I see no particular significance to that.

Mr. Clark: Very well, your Honor. May I have the question answered?

Q. Did Mr. Nicodemus dictate that or prepare it?

A. I do not know. The only thing I know is——

Mr. MacKinnon: Just a minute. Just a minute. I object to these gratuitous remarks by the witness.

The Court: Everything after "I do not know" may go out.

Mr. Clark: We will consent that it go out.

Mr. MacKinnon: I submit, your Honor, you should instruct the witness to answer the questions because there has been a great deal of volunteering on his part. [363]

(Testimony of Michael J. Curry.)

The Court: I will rule on it when it comes up.

Q. (By Mr. Clark): Let me direct your attention, Mr. Curry, to the time when you signed the consolidated tax return in the name of plaintiff corporation for the year 1943, which the record in this case shows was on July 15, 1944. Have you that incident in mind? A. Yes.

Q. Where were you when you signed those returns?

The Court: He has already testified to that.

Mr. Clark: Not with respect to 1943, your Honor. He has testified with respect to 1942, with respect to 1944 and with respect to——

The Court: I thought Mr. Phleger took each one of the returns and the refund.

Mr. MacKinnon: That is my recollection of the record. It accords with yours.

Mr. Clark: I do not think he took 1943.

The Court: I think he stated, if my recollection is correct, in answer to Mr. Phleger's question that it was signed under the same conditions, circumstances. I may be wrong about that.

Mr. Clark: I think that is 1944.

The Court: He took up three instances, two tax returns and a refund, if I remember correctly.

Mr. Clark: That is all I want to establish, your Honor. [364] At the cost of one question may I have an answer?

The Court: You signed the returns and the refund claim all under the same circumstances, did you, Mr. Curry? Is that a fair statement?

(Testimony of Michael J. Curry.)

The Witness: Yes, your Honor.

Mr. MacKinnon: Your Honor, I do not think that is true at all because the witness' prior testimony is that he signed the 1942 and 1943 returns at 37 Wall Street.

Mr. Clark: That is right; they are in different places.

The Court: All right.

Mr. Phleger: I take it he meant by circumstances the same general conditions, not the locus. However, I think I asked him and he answered every one of those questions.

Mr. Clark: I will withdraw the question, then.

Q. At the time you signed the 1943 returns, Mr. Curry, did you have any conversation with Miss Valouch? A. The 1943 returns?

Q. Yes. The evidence shows they were signed—

A. Yes, I testified she informed me that the stock loss was being written off, and that was practically the only conversation we had. The return was in front of me. I looked at the first sheet all the way down the column, and I asked her if Mr. Polk approved this return as prepared. She said Yes, and so I signed it.

Q. Prior to your signing of the return had you received any [365] advice from Mr. Polk or anyone in the Coulson firm concerning any possible liability on the holding corporation in signing such consolidated return? A. No, I did not.

Q. At that time you knew, did you not, that it

(Testimony of Michael J. Curry.)

was proposed to use the stock loss to effect a tax saving for the railroad company? A. Yes.

Q. And for how long had you known that?

A. I do not recall. It was the talk off and on for some time.

Q. You knew at that time that a reserve had been set up in early 1944 as a reserve against possible tax liability in the event the Government did not accept that method of returning the taxes?

A. It is my recollection that that reserve was set up early in 1944—that is right, 1944.

Q. That is right. A. That is right, 1944.

Q. And that is the reserve that has been testified to in this case? A. Yes.

Q. Did you learn about that reserve soon after it was in fact created, in March of 1944?

A. Yes, I did. Mr. Schumacher told me about it. He was a trustee. [366]

Q. What was your understanding of the reason for setting that reserve up?

A. Well, the possibility of contingent tax liabilities, that was all. The settlement with the Government on those tax returns had not been determined or decided.

Q. At that time, namely, in March of 1944, did you know that it was contemplated to use the corporation's stock loss in a consolidated return to save taxes for the railroad company?

A. That was my knowledge at the time.

Q. You knew that was the plan? A. Yes.

(Testimony of Michael J. Curry.)

Q. Had you seen the annual statement of the railroad company for the year 1943 prior to the time you signed the consolidated returns for 1943?

A. You mean the annual report that they publish?

Q. Yes, to stockholders.

* * *

The Witness: What is the question again?

Q. (By Mr. Clark): Did you see the annual report of the [367] railroad company for the year 1943 at about the time it came out? A. Yes.

Q. Did you notice the statement in it regarding the proposed use of the stock loss of the corporation? A. Yes.

Q. For tax purposes? A. Yes.

Q. You knew these things prior to the time you signed the 1943 return, did you not?

A. I did.

Q. Did it occur to you at that time to ask anyone about retaining independent counsel for the corporation? A. Did it occur to me?

Q. Yes. A. I do not recall that it did.

Q. Did you seek advice from anyone at all before you signed these returns other than you have testified to?

Mr. MacKinnon: Your Honor, the question is vague and indefinite. Advice as to what?

Q. (By Mr. Clark): Did you consult anyone with respect to whether or not you ought to sign those returns prior to signing them?

(Testimony of Michael J. Curry.)

A. No, I did not, and as I have testified before——

Mr. MacKinnon: I move to strike out everything after “No, [368] I did not,” on the ground it is not responsive.

The Court: It has already been covered.

Mr. Clark: Very well.

We will next offer in evidence, if it please the Court, as Interveners’ Exhibit 5, I believe, a copy of a letter addressed to Pierce & Greer, 40 Wall Street, dated February 21, 1945, with a stamp “(Signed) M. J. Curry,” which has been marked as Railroad Company Defendant’s Exhibit 407-A on the deposition.

(The letter referred to was received in evidence and marked Interveners’ Exhibit 5.) [369]

Mr. Clark: This is the copy produced from the corporation’s files.

Q. Mr. Curry, at the time you signed the returns for 1943, on July 15, 1944, did it occur to you that the holding corporation, of which you were president, might possibly have some claim to share in the tax savings that you knew were being effected?

A. It did not occur to me at that time, no.

Q. Did that ever occur to you?

A. No, it never occurred to me.

Q. At any time? A. At any time.

Q. Not right up to the present time?

(Testimony of Michael J. Curry.)

A. Oh yes, it occurred to me in 1946.

Q. What was the occasion for——

A. When the suit was filed in the New York court.

Q. You mean it first occurred to you after the VanKirk action was filed in New York?

A. That was the first time that it ever occurred to me that we might possibly participate or had rights in that tax saving.

Q. Is that the first time that anyone ever mentioned to you, that is, anyone on behalf of the corporation, ever mentioned to you that the corporation might possibly be entitled to some share in those savings?

A. It is my recollection that that is the first time.

Q. Never discussed before that, so far as you know? [370]

A. No.

Q. Prior to that time, namely, prior to the time the VanKirk case was filed in New York, to your knowledge had any claim been made by any one on the part of the holding corporation for any part of these tax savings?

A. That is correct.

Q. Well, had a claim been made or not prior to that?

A. No claim had been made prior to the institution of the suit.

The Court: What do you mean? A claim by a stockholder?

Mr. Clark: By anybody, to these tax savings. This whole litigation was instituted by these inter-

(Testimony of Michael J. Curry.)

veners in New York.

The Court: I understand that, but the question is not clear to me. I suppose what you are trying to get at is this: Had anybody asked the corporation to take any action with respect to its rights, is that what you mean?

Mr. Clark: That was it. I will reframe the question, your Honor.

Q. Prior to the time the VanKirk litigation was filed in New York, Mr. Curry, in June of 1946, was any step taken by anyone to your knowledge to get the corporation to assert this claim?

A. No.

Mr. MacKinnon: I submit, your Honor, that is a responsive answer.

The Court: Give him a chance. Maybe he wants to change it.

Mr. MacKinnon: He gushes forth all the time.

The Court: You will have to be patient. Every witness is not as smart as the lawyers, and sometimes they have difficulty answering questions.

Q. (By Mr. Clark): Do you have anything to add, Mr. Curry?

The Court: Are you bothered about whether your answer is correct or not?

A. Yes, I am a little bit. I just want to explain my answer a little bit. That is all. I had no idea we had any rights. I relied entirely on our tax counsel——

The Court: That is not what he wants to know. What the lawyer wants to know who is examining

(Testimony of Michael J. Curry.)

you now is, did anybody, stockholder or otherwise, make any demand or request or claim upon the corporation of which you were president and assert a claim on behalf of the corporation for a share in any savings that might result from that return?

Mr. Clark: Prior to the VanKirk action.

The Court: Prior to the time you heard about this suit filed in New York.

A. Well, I know that some stockholders had brought the question up, and I referred them to Mr. Nicodemus because they were asking me legal questions.

Q. (By Mr. Clark): You have in mind Mr. Offerman? A. Yes.

Q. Mr. Jaffin and Mr. Wershil?

A. Correct. [372]

Q. At a time they appeared in your office in December 1943? A. Correct.

Q. Beyond that, were there any other efforts made, so far as you know, to get the corporation of which you were president to take action in this matter? A. No.

Q. Referring, Mr. Curry, to the letter which has just been received as Interveners' 5, dated February 1, 1945, addressed by you to Pierce & Greer, I want to direct your attention to this portion of it, and this has to do with the franchise taxes due the State of Delaware.

Do you have some recollection of that problem?

A. I have.

Q. Was it a constantly recurring one?

(Testimony of Michael J. Curry.)

A. Yes, yes, it was.

Q. The point I have in mind is this, and this is your letter:

“The question I have in mind is whether we should pay these taxes or let them go by default. If we default and our charter is voided, the question arises what would be the effect on the consolidated income and excess profits tax returns filed by the corporation as parent for the years 1942, 1943 and 1944 (to May 1),”

which is struck out on the copy——

The Witness: Yes.

Mr. Clark: “As you know, a very large deduction was taken [373] in 1943 which wipes out any tax liability for that year and will also have an effect on the 1942 and 1944 consolidated returns. I understand the total tax savings to the Western Pacific Railroad Company will amount to about \$15,000,000. Therefore I feel the payment or non-payment of these franchise taxes must be determined particularly from the federal income tax angle. I would suggest that before arriving at a decision in this matter you confer with the firm of Whitman, Ransom, Coulson and Goetz, our tax counsel, who are aware of the situation and are considering the consequences which the non-payment of these franchise taxes would have from an income tax viewpoint.” [374]

Q. Now having had that language read to you from your letter, Mr. Curry, as of February 21, 1945, can you tell us what was in your mind at

(Testimony of Michael J. Curry.)

that time with respect to any connection between the continuance of the charter of the holding company and the tax situation of the railroad company?

Mr. MacKinnon: That is a mischaracterization. It wasn't a tax situation of the railroad, it was the affiliated group. I don't think you can expect them to answer that.

The Court: Yes, I can't see how you can expect him to answer that question anyway.

Q. (By Mr. Clark): What did you have in mind, Mr. Curry, in writing the language which I have read to you?

A. Let me say that this paragraph here, referring to——

The Court: Isn't it self-explanatory?

Mr. Clark: Well, I don't know that it is, your Honor.

The Court: Well, it is clear to me what he wrote. Maybe he meant something else; do you want him to develop that he meant something differently in that regard?

Mr. Clark: No, I don't your honor. This witness—perhaps the situation we are laboring under is that we have taken depositions in this case, and we know the answers that have been given on other occasions, and I simply want this witness' answer concerning what he meant when he used that language. It may develop someone else wrote the letter, your Honor.

(Testimony of Michael J. Curry.)

The Court: Well, if that is what you want to bring out you [375] may ask him.

The Witness: I was just about to state that this reference here to the taxes and so forth, I got help from Miss Valouch on those paragraphs, and we had in mind the continuance of the charter for tax purposes.

Q. (By Mr. Clark): And for whose tax purposes?

A. The consolidated return, the corporation and its affiliates.

Q. For whose tax saving?

The Court: Well, doesn't that speak for itself?

Mr. Clark: I think it does. [376]

* * *

MICHAEL J. CURRY

Direct Examination by Interveners (Resumed)

By Mr. Clark:

Q. Now, Mr. Curry, at the close of yesterday afternoon's session you were being examined with respect to a letter dated February 21, 1945, addressed by you to Messrs. Pierce & Greer, attention F. C. Nicodemus, Jr., copy to James K. Polk, of Whitman, Ransom, Coulson & Goetz; which letter was received in evidence in this case as Interveners' No. 5. You will remember that that had to do with certain franchise taxes owing by the holding corporation to the State of Delaware.

(Testimony of Michael J. Curry.)

A. Yes.

Q. Now, let me show you a copy of the telegram which has been received in evidence in this case as Plaintiff's Exhibit 45, from you to Mr. Coulson at the Mark Hopkins Hotel, dated March 26, 1945 (handing to witness). A. Yes, sir.

Q. Now, does that telegram refer to the franchise taxes which you discuss in Interveners' Exhibit No. 5? A. Yes. [382]

Q. Now, what was the occasion for your sending this telegram, Plaintiff's Exhibit 45, to Mr. Coulson at the Mark Hopkins Hotel in San Francisco?

A. He requested that I notify him there as to the decision of the Tax Board.

Q. Now, were those taxes as reduced ultimately paid? A. Yes, they were.

Q. And from what source did the holding corporation get the money to pay them?

Mr. MacKinnon: I submit, your Honor, that is not the best evidence. Payment ought to be demonstrated by the documents themselves, rather than relying on the recollection of the witness.

Mr. Clark: I am relying on the witness' recollection, your Honor.

The Court: The witness may know. I will overrule the objection.

A. Well, I am not sure whether it was for those years or not that we borrowed money from the A. C.—

(Testimony of Michael J. Curry.)

Mr. MacKinnon: Your Honor, I object to that on the ground it is not responsive.

Mr. Clark: All right. Just a moment.

Q. Let me direct your attention, Mr. Curry, to some minutes of the board of directors of the holding corporation held on Tuesday, July 31, 1945, being Plaintiff's Exhibit 46. I direct [383] your attention particularly to page 27 of the minute book, the second paragraph from the bottom, and after having refreshed your recollection with those minutes, would you tell us from what source the monies were obtained with which the franchise taxes mentioned in Interveners' Exhibit 5 were paid (handing to witness)?

A. The money was borrowed from the A. C. James Company.

Mr. Clark: Thank you.

Now, may it please your Honor, we will now offer in evidence as Interveners' Exhibit 6 a copy of a letter dated May 31, 1944, addressed to Mr. F. C. Nicodemus, Jr., 40 Wall Street, New York, signed by M. J. Curry, together with a penciled notation on it.

(The letter referred to was received in evidence and marked Interveners' Exhibit 6.)

Mr. Clark: This letter reads as follows, your Honor:

"Dear Mr. Nicodemus:

As you know, (see copies of our letters dated

(Testimony of Michael J. Curry.)

March 21, 1944, State of Delaware, Office of Attorney General; and March 31, 1944, to Corporation Trust Company, Wilmington, Delaware) the State Tax Board granted extension to July 1, '44, for payment of the corporation's 1941 franchise tax, which as of July 1, 1944, will amount to \$1262.50 principal plus penalty interest of 4% from July 1, 1942, [384] amounting to \$101; a total of \$1363.50.

In view of the conditions surrounding the corporation at this time, I should like to have your opinion as to what should be done in the matter of payment or nonpayment of the tax. If not paid on or before July 1, 1944, its charter will be voided.

Yours very truly,

M. J. CURRY."

Mr. MacKinnon: Mr. Clark, the offer includes the notation?

Mr. Clark: I have already stated that, Mr. MacKinnon. I am only interested in the part I read to his Honor.

We will next offer as Interveners' 7 the reply to the last exhibit, being an original letter addressed to Mr. M. J. Curry as President, the Western Pacific Railroad Corporation, 37 Wall Street, New York, signed F. C. Nicodemus, Jr., which letter is marked on the deposition as Interveners' Exhibit 229, the letter being dated June 14, 1944.

(The letter referred to was received in evidence and marked Interveners' Exhibit 7.)

(Testimony of Michael J. Curry.)

Mr. Clark: This letter reads as follows, your Honor: This is from Mr. Nicodemus.

“Dear Mr. Curry:

As I mentioned to you yesterday, I talked with Colonel Coulson about the compromise proposal respecting the Delaware franchise tax, involving the total payment as of July 1, 1944, of the sum of \$1363.50. In the course of this talk I explained to Colonel Coulson that it would be necessary to make this payment in order to continue the corporate existence of the company through the current calendar year and that I did not see how we could avoid making this payment out of current available cash.

I told him that I felt quite sure, and he agreed, that Mr. Buckland would recognize the necessity of this payment, should he ultimately succeed in maintaining his claim of a lien on our cash derived from the Standard Realty and Development Company, notwithstanding the fact that his own claim has been satisfied and he has been made whole under the Commission's plan of reorganization. You may therefore arrange for the payment referred to in your letter to me of May 31, 1944.

Yours very truly,

F. C. NICODEMUS, JR.”

(Testimony of Michael J. Curry.)

And we also offer the pencil notations on this exhibit.

We will next offer in evidence as Interveners' Exhibit 8 a copy of letter dated March 27, 1943, addressed to the State [386] of Delaware, State Tax Department, 843 King Street, Wilmington, Delaware, and signed M. J. Curry, blind copy, B.C.C., to Mr. F. C. Nicodemus, Jr., together with the pencil notation in green pencil on the second page of this letter.

Mr. MacKinnon: What prior identification?

Mr. Clark: I have stated the date.

Mr. MacKinnon: Did it have an exhibit number on it?

Mr. Clark: I am sorry. Yes. This letter was marked on the deposition as Railroad Company's Exhibit 415.

(The letter referred to was received in evidence and marked Interveners' Exhibit 8.)

* * *

Q. Now, Mr. Curry, at the time you signed the consolidated returns for 1943, which the record shows was on July 15, 1944, did you know that the Coulson firm represented the A. C. James Company in the reorganization?

(Testimony of Michael J. Curry.)

A. I did not definitely, no.

Mr. Clark: Is Mr. Curry's deposition here?

The Clerk: Yes, it is, counsel.

Mr. Clark: May I have it?

Page 2788. Commencing on page 2787, your Honor.

Mr. Curry, I will read the following questions and answers from page 2787 of your deposition:

“Q. Do you know whether or not that firm (referring to Whitman, Ransom, Coulson & Goetz) represented the James Foundation?

“Mr. Shaw: I will object to that. There is no foundation laid that the James Foundation was in the reorganization proceeding.

“The Witness: The question again, please?

“Mr. Clark: I will reframe it.

“Q. Did you have any understanding at that time with respect to whether or not the firm of Whitman, Ransom, Coulson & Goetz represented the James interests? A. I did not.

(Testimony of Michael J. Curry.)

“Q. You knew nothing about that at all?

“A. Of my own knowledge, that is right.

“Q. What was your understanding in that regard, if anything?

“A. It was my understanding they did.

“Q. Did you have that understanding throughout this period we have been discussing commencing on March 15, 1943? A. Yes.”

Do you remember giving that testimony on deposition? A. Yes, I remember.

Q. Are those answers correct? A. Yes.

Mr. Clark: The connection with Plaintiff's Exhibit 66, which is already in evidence and is a letter having to do with the files in the possession of Mr. Curry in December, 1946, we will offer letter dated December 11, 1946, addressed to Allan P. Matthew, Balfour Building, San Francisco, on the letterhead of Whitman, Ransom, Coulson & Goetz, signed Robert E. Coulson, and which is also identified as Interveners' Exhibit 207 on the deposition.

(The letter referred to was received in evidence and [393] marked Interveners' Exhibit 9.)

Mr. Clark: This letter, may it please your Honor, is dated at a time after both the VanKirk and the present litigation had been filed for these tax savings, and while Mr. Coulson's firm was still joint tax counsel for both the plaintiff corporation and the defendant company, and I am reading

(Testimony of Michael J. Curry.)

from the last paragraph in this letter, Interveners' Exhibit 9.

"Naturally my interest in the question discussed in this letter," being the files and the redistribution of them which had been suggested, "Naturally my interest in the question discussed in this letter is solely in protecting the operating company in connection with the VanKirk litigation here in New York of which we have partial counterparts in the actions brought by the holding company in California. In this connection we have received copies of your answers in the California tax action of the holding company, and I have also talked with Mr. Polk about his discussions with your office."

Mr. Adams: Mr. Clark, you will state for the record the portions you have just read, containing a reference to "your answers in the California transaction" refer to the answers which we filed in behalf of the railroad company, defendants in this action? [394]

Mr. Clark: Oh, yes. I think the letter clearly shows that.

Lastly, your Honor, we will offer as Interveners' exhibit next in order, being Interveners' 10, and in connection with the letter already received as Plaintiff's Exhibit 72, a copy of a letter dated February 11, 1947, addressed to James K. Polk, Esq., Carlton Hotel, Washington, D. C., signed with a stamp reading "Original signed Charles Elsey," it having been

(Testimony of Michael J. Curry.)

previously identified on deposition as Railroad Company Exhibit 938. This letter, may it please your Honor, is the railroad file copy of the original letter, which is already in evidence as Plaintiff's Exhibit 72, and I am offering it for only a limited purpose.

(The copy of letter referred to was received in evidence and marked Interveners' Exhibit 10.) [395]

* * *

Cross-Examination

By Mr. Adams:

Q. Mr. Curry, when did you first enter the railroad company business?

A. Around 1898, I believe.

Q. And from that time until your retirement in 1945, were you always engaged in the railroad business? A. That's right.

Q. Now in addition to being vice-president, assistant secretary and assistant treasurer at the Western Pacific Railroad Company, it is a fact, is it not, that you were also a director and a member of the Executive Committee of the Western Pacific Railroad Company? A. That's correct.

Q. And those offices you held from May 6, 1940, until November 20, 1944? I am referring to the offices of director and as a [396] member of the Executive Committee? A. That's correct.

Q. So that you retired from those two offices

(Testimony of Michael J. Curry.)

prior to the time when the railroad properties were returned by the trustees to the reorganized company?

A. I don't quite understand. I retired from what positions?

Q. Those of director and member of the Executive Committee.

A. Of the railroad company?

Q. Yes. A. That's correct.

Q. Were you also a director of the Railway Express Agency as an alternate for Mr. Schumacher?

A. That's correct.

Q. And were you also a director of the Denver, Salt Lake & Rio Grande Junction Railroad?

A. Yes.

Q. Now from 1927 to 1942, Mr. Curry, that period of time during which you, in the New York office, were an officer both of the railroad company and the railroad corporation, was your combined salary for those two companies \$9,900 a year?

A. I think that is correct. I can't remember back that far, just what the salaries were. They could change from time to time.

Q. We have an exhibit in the record showing, I believe, that your salary, combined salaries for the two companies in the [397] year 1938 was \$9,900 a year. Would that be in accordance with your recollection?

A. That is in accordance with my recollection, yes.

(Testimony of Michael J. Curry.)

Q. Did you also receive compensation as an officer of the Denver & Rio Grande Western?

A. I did.

Q. And was that approximately a thousand dollars a year?

A. Yes, it started out at \$900 and I think it reached a thousand.

Q. Now after you became President of the Western Pacific Railroad Corporation, was your combined salary from the company and the corporation \$11,700 a year?

A. That is my recollection, yes.

Mr. Adams: And may I ask, Mr. Clerk, that there be handed to Mr. Curry Plaintiff's Exhibit 20-B, the 1943 Annual Report? It is a printed document, one of those annual reports.

The Court: That is the 1943 report?

Mr. Adams: Yes, your Honor. It is the report for the year 1943. You might hand it to him, if you please, if that is convenient to you, Mr. Elkington.

The Clerk: That is all right.

Mr. Adams: Mr. Curry, if you will turn over to the page close to the beginning, where the list of directors and officers is printed?

A. Yes, sir. [398]

Q. Do you find that? A. I have it.

Q. What page is it, just for the record?

A. It is page 1.

Q. Now directing your attention to the names of the officers of the railroad company which appear

(Testimony of Michael J. Curry.)

on that page, does Mr. Schumacher's name appear first? A. It does.

Q. And Mr. Elsey's appears second?

A. Yes.

Q. And your own third? A. Yes.

Q. And were you at that time the third ranking officer in the Western Pacific organization?

A. I wouldn't say that, no.

Q. And the names of what officers appearing below your own, Mr. Curry, would you say were ranked before you?

A. Why, I believe Mason, the Vice President and General Manager and Poulterer, the Vice President in charge of traffic, and the Chief Engineer, were more important officers than I was.

Q. Do you know whether or not their compensation was greater than yours?

A. I do not at the moment, no.

Q. It is the fact, is it not, that you gave instructions from [399] time to time to Mr. DeGraff, the General Auditor? A. Yes.

Q. Tank you, Mr. Curry. That is all about that exhibit.

Do you recall, Mr. Curry, yesterday when Mr. Phleger asked you about the occasion when you signed the power of attorney in behalf of the plaintiff corporation to Mr. Polk, Mr. Noneman and Mr. Cavanaugh? A. I recall it, yes.

Q. That was in late June of 1946?

A. That's correct.

(Testimony of Michael J. Curry.)

Q. And you recall that Mr. Phleger asked you whether you consulted with anyone prior to signing the power of attorney? A. Yes.

Q. Now do you remember that Mr. Clark asked you about that at the time that your deposition was taken in New York last March?

A. Yes, I recall that.

Q. And I would like to refer to the testimony which you gave at that time, when your deposition was taken, and ask you some questions about that. I will refer to page 2929 of the transcript of your deposition and perhaps Mr. Curry might have a copy in front of him.

(Handed to witness by the Clerk.)

The Witness: What is the page number?

Q. (By Mr. Adams): 2929, beginning, Mr. Curry, five lines [400] from the bottom of the page (reading):

“Q. (By Mr. Clark):

“Q. Prior to signing the original power of attorney of June 26, 1946, on that date, did you take up the matter of your signing a power of attorney for the corporation with any of its officers or directors?

“A. I do not recall that I did.

“Q. Did you discuss it with anyone whomsoever other than Miss Valouch? A. No.

“Q. Did you ask Miss Valouch or anyone else whether you, as president, had the authority to sign such a power of attorney?

(Testimony of Michael J. Curry.)

“A. On second thought, my recollection is that I phoned Mr. Nicodemus, corporation counsel, and told him that this power of attorney was before me and asked if it was all right to execute it. That is my recollection.

“Q. What is your recollection concerning what Mr. Nicodemus replied to your inquiry?

“A. That it was o.k. to do it. And then I placed my signature on it.

“Q. Did you tell Mr. Nicodemus during that telephone conversation the reason or necessity for your being requested by Miss Valouch to sign this power of attorney? [401]

“A. I do not recall whether I did or not.

“Q. Didn't Mr. Nicodemus ask you why it was necessary for the corporation to give a power of attorney at that time?

“A. I do not remember the conversation at all, sir.

“Q. Do you remember whether or not such a conversation ever took place?

“A. I have said that it was my recollection that I called Mr. Nicodemus and told him about it.

“Q. Is it your recollection that this conversation with Mr. Nicodemus took place on or about June 16, 1946, and prior to the time you signed the original instrument?

“A. That is my recollection.”

Do you remember being asked those questions and giving those answers? A. I do.

(Testimony of Michael J. Curry.)

Q. And were they true at the time you gave them?

A. At that time that was my recollection.

Q. And at the time you gave that testimony, you believed it to be true?

A. According to my recollection, yes.

Q. Well, I take it, Mr. Curry, that at the time you gave those answers, you believed them to be true, did you not? A. Oh, yes. [402]

Q. And thereafter, Mr. Curry, after you had completed giving your testimony upon the taking of your deposition, did you read this carefully?

A. I did.

Q. You made a number of corrections in it, did you not? A. I did.

Q. And you read this portion, did you not?

A. I did.

Q. And you made no corrections in that portion?

A. I don't recall that I did.

Q. You have before you the original document, which would show all your corrections, if you will look at it? I think you will see that that is so.

A. Well, there is no correction on this testimony that we have read.

Q. Right. Now at the time you read your deposition and corrected it, you examined it carefully, did you not? A. I did.

Q. And at the time you signed it, did you believe that the testimony I just read to you was true?

A. Yes.

(Testimony of Michael J. Curry.)

Q. Now yesterday, while Mr. Phleger was asking you questions about this same occasion, the following questions were asked and the following answers were given, given at the bottom of page 325 of the transcript of the testimony in this case. May [403] the witness have a copy?

The Court: I will give him a copy. (Handing copy of transcript to the witness.)

Q. (By Mr. Adams): Beginning at the bottom of page 325, Mr. Curry, (reading)

“Q. I now show you, Mr. Curry, Plaintiff’s Exhibit 65, a power of attorney of the Western Pacific Railroad Corporation dated June 26, 1946, running to James K. Polk and others. Do you recall having executed the original of that power of attorney?

“A. I do.

“Q. At whose instance did you sign it?

“A. It was brought to me in my office at 40 Wall Street, Whitman and Ransom, 52nd floor, by Miss Valouch, who is on the same floor, and she stated that Mr. Polk desired that this power of attorney be executed, and I signed it.

“Q. Where were you when you signed it?

“At 40 Wall Street in the suite of Whitman, Ransom, Coulson and Goetz.

“Q. Did you consult any of the directors or any officer of the corporation before you executed that power of attorney as to whether or not you should sign it?

“A. I did not, as I depended entirely on our tax counsel for putting those things before us.

(Testimony of Michael J. Curry.)

“Mr. MacKinnon: I move to strike out everything after ‘I did not’ as not responsive. [404]

“Mr. Phleger: It may go out as far as I am concerned.

“The Court: It may go out.

“Q. (By Mr. Phleger): Did you consult with anyone prior to signing that power of attorney?

“A. Not to my knowledge.”

And you recall answering those questions that way yesterday under your examination by Mr. Phleger? A. I do.

Q. And at the time you gave that testimony, did you believe it to be true? A. I did.

Q. Now at the time you gave that testimony yesterday, Mr. Curry, did you have in mind the testimony you had given upon the taking of your deposition which I have already read to you?

A. Yes, I had that in mind, and I recalled that I was under the impression I talked to Mr. Nicodemus about it, but since that deposition was taken, I have thought a lot about it and I have looked through my files to see if there was a memo, and I am satisfied that I did not talk to Mr. Nicodemus about it.

Q. Was the last answer you were satisfied you didn't talk to him about it? A. Yes.

Q. And what is it that has satisfied you that you didn't talk to him, since you gave your testimony at the time of the deposition [405] that your best recollection was that you did?

(Testimony of Michael J. Curry.)

A. Well, I have thought a great deal about it, and as I say, I have no memo in my files indicating that I did ask Mr. Nicodemus whether or not I signed it, and I seem convinced that I did not discuss it with Mr. Nicodemus.

Q. Is it your thought that your recollection at this time is better than it was a year ago on the subject?

A. I think so, yes, sir. I have had more time to reflect on those things, and that is the way I feel about it now.

Q. You have discussed this subject, I take it, with other gentlemen on your side of the case?

A. Yes.

Q. This particular subject?

A. I have talked to my lawyers about various things in connection with my testimony.

Q. And you have discussed this particular occasion, have you not? That is to say, the occasion on which you signed the power of attorney?

A. I don't recall that I did specifically discuss that matter.

Q. Have you discussed with them at all the question of whether or not you telephoned or got in touch with Mr. Nicodemus to ask his advice prior to signing the power of attorney?

A. I don't recall that I discussed that question with him.

Q. Pardon me, go ahead. I shouldn't interrupt you. [406]

(Testimony of Michael J. Curry.)

A. There is nothing further for me to say.

Mr. Adams: Would you read Mr. Curry's answer, the last answer? I want to be sure he has full opportunity to complete any statement.

(Previous answer read.)

Q. (By Mr. Adams): And is it your best recollection, Mr. Curry, at this time that at no time since giving your testimony upon the taking of the deposition, have you discussed with anybody, any lawyer on your side of the case the question of whether or not you did telephone to Mr. Nicodemus before you signed the power of attorney?

A. It is my best recollection I haven't discussed it with anybody.

Q. And what is it, then, that has occasioned your coming to the conclusion at this time that the testimony which you gave upon the taking of your deposition was erroneous?

A. Well, as I have stated, reflecting on my testimony at that time, after it was given, it occurred to me that after thinking over the matter pretty thoroughly, I had no recollection of talking to Nicodemus about it, and I have convinced myself that that was the situation.

Q. At the time you gave your testimony, you did have such a recollection?

A. I did at that time, yes. [407]

* * *

Q. (By Mr. Adams): Mr. Curry, do you recall

(Testimony of Michael J. Curry.)

yesterday in answer to a question put to you by Mr. Phleger with regard to bookkeeping the question that he put and the answer that you gave in that regard? A. I do.

Q. If I may, I will read it to you, from page 321 of the transcript of yesterday's testimony, line 25:

“Q. Did you ever make any entries upon books?

“A. I never put pen or pencil to any book of the corporation. I depended entirely on the employee who was delegated that work.”

A. I remember that, yes.

Q. You recall that testimony. Do you recall the giving of your deposition in New York last March, when I asked you some questions, when I was questioning you, with regard to a journal entry which you yourself prepared reflecting the transfer of the stock of the railroad company to the reorganization committee?

A. I recall that. That was a memorandum, not a bookkeeping entry.

Q. I would like to direct your attention to the testimony that [408] you gave in that connection on page 3,411 of the transcript of your testimony taken at that time.

Mr. Adams: At this time, and in connection with this third question, I will offer as railroad defendant's exhibit 1, in this case a single sheet of handwriting previously identified as Railroad Co. defendant's exhibit 385, and Railroad defendant's 2, in this

(Testimony of Michael J. Curry.)

case, a single sheet of typewriting with some endorsements upon it previously identified as Railroad Defendant's Exhibit 386.

Mr. Phleger: Excuse me for interrupting. Those Journal entries have to do with some material that is covered by one of our exhibits, do they not?

Mr. Adams: That is right. Plaintiff's Exhibit 44, previously offered, and particularly the page identified as Interveners' 36K of Plaintiff's Exhibit 44.

Mr. Phleger: Is it the same sheet?

Mr. Adams: No, not at all. This page of the plaintiff's exhibit, your Honor, is a copy of an actual entry and the documents I am offering are documents that were prepared prior to the making of the actual entry.

If it may be understood that as the "Defendant's Exhibits" are offered by me, we will save putting "Railroad" in front of that word.

(The documents referred to were thereupon received in evidence and marked respectively Defendant's Exhibits 1 and 2.) [409]

Mr. Adams: Mr. Curry, you have in your hands Defendant's Exhibits 1 and 2 just offered in evidence? A. I have.

Q. Would you please state to the Court what Defendant's Exhibit 1 is?

A. It is a handwritten memo by me with reference to the record of transfer of the ownership of the capital stock to the reorganization committee

(Testimony of Michael J. Curry.)

under the plan of reorganization of the Western Pacific Railroad Company, pursuant to order of the Federal District Court for the Northern District of California, dated December 17, 1943; and also under and pursuant to an agreement dated November 22, 1943, between the Western Pacific Railroad Corporation, its secured creditors, and said reorganization committee, and approval of the stockholders of the Western Pacific Railroad Corporation given at special meeting held April 20, 1944. That is the typewritten statement, with the corrections in pencil made by me.

Q. The typewritten statement is identified for the record as Defendant's Exhibit No. 2. Would you please state to the Court what the pencil record, Defendant's Exhibit No. 1, is?

A. It is a repetition of just what I have read from the typed memo and I, to make sure that the corrections made on this typewritten copy were incorporated, wrote it out for the purpose.

Q. Did you prepare those papers, and particularly Defendant's No. 1, your handwritten copy, for the purpose of preparing an [410] entry to be made upon the journal of the corporation?

Mr. Clarke: I object to that, your Honor, on the ground it assumes something not in evidence. Counsel will note that the evidence in this case shows that the typed memorandum was prepared by Miss Valouch. The question asked assumes the witness prepared both of them.

(Testimony of Michael J. Curry.)

The Witness: I did not. This was merely a re-write of the memorandum.

Mr. Clark: Prepared by Miss Valouch.

Q. Is that correct?

A. That memorandum was prepared by Miss Valouch and placed before me.

Mr. Adams: If your Honor please, addressing my remarks to the Court, if counsel has objections to my questions, may I request that the objections be stated to the Court and that my examination be not interrupted?

The Court: Yes.

Q. (By Mr. Adams): Mr. Curry, referring to Defendant's No. 2, the typewritten document, is it your recollection that that was prepared by Miss Valouch? A. Yes.

Q. And is it your recollection that you made the corrections upon it, that appear upon it?

A. Yes.

Q. And is it your recollection further, then, that you then [411] wrote the handwritten copy to have a single clear, uncorrected copy of that proposed journal entry? A. That is correct.

Q. Did you do this for the purpose of making up the entry that was to be entered in the journal of the corporation?

A. I did not. I did make the corrections, as I felt it would clarify the statement. That is all.

Q. What was your purpose in making the corrections?

(Testimony of Michael J. Curry.)

A. My purpose was to clarify the statement.

Q. You knew, did you not, that the statement was one prepared for entry in the journal of the plaintiff corporation? A. Yes.

Q. And you corrected it so that it would be a correct entry?

A. Well, not a correct entry, so far as the entry itself was concerned. I corrected it in certain places there that I felt would more nearly express what was intended.

Q. And be a more accurate statement?

A. That is how I felt about it at the time, yes; but I had nothing to do with preparing this memorandum originally.

Q. What you had to do with it, I take it, is what you testified to? A. Just the corrections.

Q. That you corrected it? A. Yes.

Q. Before the time it was entered? [42]

A. Before?

Q. Yes.

A. Before it was entered on the books.

Mr. Adams: May the record show, by stipulation of counsel, that the actual entry shown at the page marked Interveners' 36K of Plaintiff's 44 conforms precisely to the corrected documents, Defendant's Exhibit 1?

Mr. Clark: I think that is true, but the documents will speak for themselves. They are all in evidence, your Honor. I think that is the fact from recollection.

(Testimony of Michael J. Curry.)

Mr. Phleger: I put them in and I will accept counsel's assurance that they are the same.

Q. (By Mr. Adams): Mr. Curry, is it a fact that the bookkeepers and accountants in the New York office were under your supervision and direction as treasurer of the parent corporation?

A. Yes, that is correct.

Q. And that was so during the entire period from 1927 to the end of 1944? A. That is right.

Q. I have no further use for the papers, if you wish to hand them back to the Clerk.

Now, during the period 1927 to 1942, Mr. Curry, was Mr. Schumacher the chief executive officer of the Western Pacific Railroad Corporation?

A. He was. [413]

Q. During that same period did he also occupy the office of Chairman of the Executive Committee of the Western Pacific Railroad Company?

A. He did.

Q. During the period of 1935 to the end of 1944, that is, from November 9, 1935 to the end of 1944, isn't it a fact that Mr. Schumacher was also one of the trustees in the reorganization proceedings of the Western Pacific Railroad Company?

A. He was.

Q. Did he during all that time maintain his office in the joint New York office at No. 37 Wall Street?

A. He did.

Q. During all of that time were you his right-hand man in the New York office?

(Testimony of Michael J. Curry.)

A. What do you mean by righthand man?

Q. Proceed, Mr. Curry. Go ahead.

A. Why, he relied upon me to carry out certain details, and so forth, and to check his papers as they came in and out of my room. He used to throw them over to me to note and check and see if everything and everybody was notified, and so forth, that was my job.

Q. Would you say it is true you were second in command of the New York office during that period?

A. Yes.

Q. Is it correct? [414]

A. That is correct. I was next to Mr. Schumacher and he looked upon me as his chief clerk or his office manager and he handed things to me.

* * *

Q. (By Mr. Adams): Mr. Curry, during that period—I am speaking of the period 1927 to 1942—were you in constant touch with Mr. Schumacher?

A. Yes.

Q. What were your duties?

A. Well, supervision of the office personnel and the carrying out any directions or instructions from Mr. Schumacher or Mr. Elsey of the railroad company. That is about all I did, was to carry out the orders of my superiors.

Q. Was it your responsibility to bring to Mr. Schumacher's attention problems which in your judgment required his decision?

A. Was it my duty—

(Testimony of Michael J. Curry.)

Mr. Adams: Will you read the question? [415]

(Question read.)

A. Yes.

Q. (By Mr. Adams): Did this require you to become familiar in general with the problems within the New York office? A. Generally, yes.

Q. Was this office the head office of the Western Pacific group during that period? A. It was.

Q. Would it be fair to say that you were in general familiar with the problems of the Western Pacific group?

A. Well, not entirely. Mr. Schumacher was Executive officer of the railroad company and of the corporation, and I think I rather looked upon him as being the responsible party for all companies.

Mr. Adams: Mr. Reporter, will you read the question?

(Question read.)

Q. (By Mr. Adams): Do you have in mind any problems with which you were unfamiliar?

A. Which question do you want me to answer first?

Q. The last one I just put to you.

Q. What was that?

(The last question was read by the reporter.)

A. No.

Q. (By Mr. Adams): Who signed the correspondence that went out of the New York office?

(Testimony of Michael J. Curry.)

A. For both companies?

Q. Yes.

A. Well, Mr. Schumacher signed the railroad company letters, and as president of the corporation, anything that was sent out on a corporation matter he signed.

Q. Did you sign any part of the correspondence?

A. Yes, I had correspondence with the general auditor that I signed in behalf of the railroad company, and as treasurer of the corporation I also signed certain letters in the corporation's behalf.

Mr. Clark: May it please the Court, may I ask if this is limited to the period prior to February, 1942?

Mr. Adams: We have been speaking of that time, have we not, Mr. Curry?

The Witness: Yes, sir, as I understand it, from 1927 to 1942.

Q. (By Mr. Adams): Was there any difference as regards the railroad company after you became president of the parent corporation with regard to this matter of signing correspondence?

A. No, that continued right along.

The Court: I should like to ask a question. If I am out of order, you can correct me. Is it in evidence what was the compensation that Mr. Schumacher got as head of the companies?

Mr. Adams: I do not think it is in evidence, your Honor, and I will ask Mr. Curry that question.

Q. Mr. Curry, it is the fact, is it not, that Mr.

(Testimony of Michael J. Curry.)

Schumacher received as trustee in reorganization an annual salary of \$15,000?

A. That is correct.

Q. Do you recall the salary he received as president of the corporation during the period 1927 to 1942, when he resigned as president?

A. To my recollection, he was receiving \$15,000 per annum.

Q. From that source?

A. From the corporation.

Q. And after he resigned as president, then is it the fact that he did not receive any further compensation from the corporation?

A. That is correct.

Q. Prior to the time when the railroad company went into reorganization, do you have any recollection of what his salaries were at that time from these two sources?

A. Well, it is my recollection he was getting \$30,000 from each for a time.

The Court: That would be up to 1935?

A. Well, I can't say up to what year.

The Court: That was the year of the reorganization.

Mr. Adams: That was when the reorganization proceedings began.

The Court: Go ahead. [418]

Q. (By Mr. Adams): Is it the fact that during the period of reorganization Mr. Schumacher was also receiving compensation from the Denver & Rio

(Testimony of Michael J. Curry.)

Grande for his financial responsibilities and employment in that connection?

A. My recollection is that at the time the Denver & Rio Grande went into bankruptcy and his salary was cut off.

Q. Now, we were talking about correspondence out of the New York office which you signed. Did other employees from the office prepare correspondence for your signature? A. Yes, sir.

Q. Was there any other officer or employee in the New York office besides Mr. Schumacher and yourself who was authorized to sign correspondence?

A. No, sir.

Q. It was either Mr. Schumacher or you?

A. Yes, sir.

Q. Did you prepare letters for Mr. Schumacher's signature?

A. Very rarely. He usually dictated his own letters.

Q. To his own secretary?

A. To his own secretary.

Q. Would you please describe in a general way what problems were handled in the New York office during the period 1927 to 1942?

A. Well, it was known as the fiscal office, the executive or fiscal office of the railroad company, and any matters, any [419] problems that came up that the New York office could take care of were referred to the New York office for handling.

Q. Were certain traffic problems also handled through the New York office?

(Testimony of Michael J. Curry.)

A. Yes, but not generally. Mr. Schumacher did not interfere with the operation of the traffic department of the railroad company. He looked to his vice president in charge of traffic to take care of that. Once in a while he would get into some little conversation about it, but I don't think he directed it at all.

Q. Were problems relating to the obtaining of credits in the Reconstruction Finance Corporation handled through the New York office?

A. They were handled by Mr. Schumacher, yes, sir.

Q. And you were familiar with that?

A. I was familiar with that, yes.

Q. And did the New York office also handle problems relating to the purchase of equipment for the railroad?

A. Yes, Mr. Schumacher had considerable to do with the purchase of equipment for the railroad company.

Q. And you were familiar with that?

A. Generally, yes.

Q. And was the matter of the annual budget for the railroad also dealt with in the New York office?

A. Yes, it was submitted to Mr. Schumacher for approval each year.

Q. And you were familiar in a general way with the annual [420] budget?

A. In a general way, but I had nothing to do

(Testimony of Michael J. Curry.)

with the makeup of the budget at all. He was the one that examined it and approved it.

Q. He also took it up, did he not, with the principal creditors, including RFC and the institutional bondholders?

A. Yes, he handled all those matters himself.

Q. So would you say it was a fair statement that the New York office dealt with all the major questions relating to the Western Pacific?

A. Yes, I would.

Q. Now, did you, as secretary of the plaintiff corporation, perform all the functions of that office as defined in the by-laws?

A. Yes, as faithfully as possible.

Q. And did you, as treasurer of the corporation, perform all the functions as defined in the by-laws?

A. I did.

Q. And you are familiar with the duties prescribed in the by-laws for each of those offices?

A. Yes, sir.

Q. As an assistant secretary and assistant treasurer of the railroad company, did you perform the functions of those offices?

A. Yes, but they were no definite functions. Under the [421] by-laws, as I stated I think a day or two ago, the board could appoint one or more vice presidents, and they would be delegated certain duties or authorized to sign papers. That was about what I was, a signing officer.

Q. You are speaking now of your office as assis-

(Testimony of Michael J. Curry.)

tant secretary and assistant treasurer of the railroad company? A. Yes, sir.

Q. Now, is it the fact, Mr. Curry, that you were responsible for all the funds and expenditures of the New York office?

A. Yes, all the funds received and disbursed were under my supervision.

Q. And it was your responsibility to see that the accounts were well kept and to authorize the expenditures? A. Yes.

Q. Now, is it the fact, Mr. Curry, that Mr. Schumacher's resignation as president of the plaintiff corporation was occasioned by the corporation's financial distress? A. Yes.

Q. When you became president, did you feel that in general you were familiar with the corporation's problems?

A. I didn't feel entirely at ease about it, but as Mr. Schumacher said, there was nothing facing us but liquidation and dissolution, and he felt I could carry through that period.

Q. Yes. Now, you told us something a little different from what I asked you. [422]

Mr. Adams: Will you read the question, please?

(Question read.)

A. Yes.

Q. (By Mr. Adams): As the president of the corporation, have you attempted to the best of your ability to discharge the duties of that office?

A. I have.

(Testimony of Michael J. Curry.)

Q. Have you attempted to the best of your ability to protect the interests of the stockholders of the plaintiff corporation? A. I have.

Q. When did you become a director of the corporation? A. I think it was in 1927.

Q. And you have ever since been a director of the corporation? A. Yes, sir.

Q. As a director of the corporation, have you always exercised your best judgment in voting on matters which came before the board?

A. I certainly have, yes, sir.

Q. Did anyone ever tell you how to vote as a director of the corporation? A. No, sir.

Q. Did anyone ever undertake to control your activities as the president of the corporation?

A. No, sir. [423]

Q. Did anyone ever tell you not to vote on any matter coming before the board of directors?

A. No, sir.

Q. Did anyone ever tell you not to bring any matter before the board of directors for its consideration? A. No, sir.

Q. Did anyone ever ask you to stay away from any meeting of the board? A. No, sir.

Q. Did you know Arthur Curtis James?

A. I did.

Q. When did you first meet him?

A. I first met him about the time I came to New York, in 1914.

(Testimony of Michael J. Curry.)

Q. That was before your association with Western Pacific? A. Oh, yes.

Q. That was during the period of your association with the El Paso and Southwestern?

A. That is correct.

Q. And during that period you were assistant to the president of that company? Not during all of it, but for the latter period?

A. During a short period of time.

Q. During the latter part?

A. During the latter part.

Q. When Mr. Schumacher was the president of that company? [424] A. That's right.

Q. Now, how often did you see Mr. James?

A. You mean during all that period?

Q. Yes.

A. Very infrequently. He used to come in to see Mr. Schumacher and I would see him going in and out of Mr. Schumacher's office.

Q. Mr. James' death occurred in June of 1941, did it not? A. That's right.

Q. Did you know Robert E. Coulson?

A. I did.

Q. When did you first meet Mr. Coulson?

A. While he was a director of the corporation, and at the time that I came to New York, I believe; and I have known him since then.

Q. Mr. Coulson resigned as a director at or about the time when you became president of the plaintiff corporation?

(Testimony of Michael J. Curry.)

A. Yes, it is my recollection he resigned early in 1942.

Q. Did you know W. W. Carman?

A. Yes.

Q. And who was Mr. Carman?

A. Well, Mr. Carman was an associate in Mr. James' organization. Just what his position was or his association was, I couldn't describe.

Q. Was it your understanding generally that he was a general and financial secretary to Mr. James? [425]

A. I can't say as to that. I don't know just what his functions were, with him. I understood he was a secretary to Mr. James for a long time.

Q. And when did you first meet Mr. Carman?

A. I met Mr. Carman about the time I came to New York in 1914.

Q. Did you see him frequently?

A. Very infrequently.

Q. And Mr. Carman was also a director of the plaintiff corporation, was he not?

A. He was.

Q. And his resignation was early in 1942, as a director? A. Correct.

Q. And aside from being a director, he was never at any time an officer of the plaintiff corporation?

A. No, Carman never was an officer.

Q. That is likewise true with regard to Mr. Coulson, is it not? A. That is correct.

(Testimony of Michael J. Curry.)

Q. Now, did Mr. James, Mr. Coulson or Mr. Carman ever tell you what you should or should not do as a director of the corporation?

A. They did not.

Q. Did they or any of them at any time ever tell you—strike that. [426]

Did Mr. Coulson or Mr. Carman at any time ever tell you what you should or should not do as president of the corporation?

A. They did not.

Q. Did any representative of the James interests ever tell you what you should or should not do as a director?

A. No.

Q. Or as the president?

A. No.

Q. Do you have any reason to believe that the board of directors of the corporation was ever dominated or controlled by anyone?

A. I have no reason to believe that that was so.

Q. What is your belief in that regard, as to whether or not the board of directors of the corporation was ever dominated or controlled by anyone?

A. It is my belief that it was not dominated by anyone.

Q. Do you have any reason to believe that the officers of the plaintiff corporation were ever dominated or controlled by anyone other than the directions of the board of directors of the corporation?

A. I have no reason to believe that such was done.

Q. Were you, as president and director of the

(Testimony of Michael J. Curry.)

corporation, ever dominated or controlled by anyone? A. I was not. [427]

* * *

Afternoon Session, Friday, February 4, 1949

Direct Examination

(Resumed)

By Mr. Adams:

Q. Mr. Curry, prior to the time the railroad company went into reorganization in 1935, what was the source of income for the parent company?

A. We had securities of both companies from which we received income.

Q. When you speak of both companies, you mean the Western Pacific and the Denver & Rio Grande? A. I do.

Q. And the income was interest and dividends on those securities? A. Yes, sir.

Q. What was the effect of the Western Pacific and Denver & Rio Grande reorganization on the income of the parent, the plaintiff herein?

A. Beginning in the latter part of '34, our income ceased from those sources, and we gradually used up what we had.

Q. Do you recall writing a series of memoranda to Mr. Schumacher during the years from 1935 to 1938 about the financial problems of the plaintiff corporation? A. Yes.

Q. Do you recall suggesting in those memoranda the advisability [429] of seeking to arrange for the reorganization trustees of the Western Pacific to

(Testimony of Michael J. Curry.)

pay a larger percentage of the expenses of the New York office? A. I do.

Q. And why did you make this suggestion?

A. Because the funds of the company were gradually diminishing to such an extent that it didn't look like we would be able to keep alive.

Mr. Adams: Now at this time, your Honor, I would like to make an offer into evidence as defendant's exhibit 3 of a number of documents following within the description just discussed with the witness. They are Railroad Exhibit's 131 to 138, as identified during the taking of the deposition of Mr. Curry. I would like to make a brief statement about the purpose of this offer, and I hope that these documents may be put in without going to the time of reading them in detail at this time.

These exhibits are memoranda prepared by Mr. Curry to Mr. Schumacher during that period, the first three years of the reorganization, and the offer has a number of purposes: first, one of the purposes is to show Mr. Curry's familiarity with the financial affairs of the Western Pacific, and his competence in dealing with those affairs, his origination of ideas for meeting the corporation's problems, and his understanding of those matters. I might illustrate that by referring to the [430] first of the exhibits, identified as Railroad's 131, and read very briefly from this memorandum of Mr. Curry's, in which he says: (reading).

“We have prepared a statement showing the setup

(Testimony of Michael J. Curry.)

of assets of the corporation, if and when the present proposals for readjustments of the two companies mentioned——”

The Court: When is this, Mr. Adams?

Mr. Adams: Back in 1935. (Continuing.)

“——become effective. There are two statements herewith. One, securities as signable by proposed readjustment of capitalization of the Western Pacific Railroad Company, and the Rio Grande Western Railroad Company, in exchange for existing securities owned, and list of other assets owned remaining unallocated.”

And then Mr. Curry's correction to change that word to “undisturbed.”

“Second, schedule of securities owned, if proposed readjustment of capitalization of Western Pacific Railroad Company and the Denver & Rio Grande Western Railroad Company is effected.”

I shall not take up your Honor's time to read much further, but this is indicative of the capacity in dealing with these matters which this current record evidences. Another purpose I have in mind in making this offer is that it does develop the fact that, as early as this time, and I shall show continuously, [431] the plaintiff corporation was progressing in a chronic state of difficulty about funds. It became in greater and greater difficulty, and during this period it went to its creditors to be supplied with the funds to keep it alive and finally it went to the Court's trustees. In fact, it went to

(Testimony of Michael J. Curry.)

them from time to time about the adjustments. So that another purpose of the offer of this portion of the record is to show that the arrangements for the trustees to pay an additional portion of the expenses of the New York office was undertaken at the suggestion of the plaintiff corporation and for its benefit.

I think I have stated substantially the purposes of this offer and, as I say, I do not want to take the Court's time up to detail the papers, but I make the offer for those purposes.

Mr. Phleger: I might state our position with respect to offers of this kind. I think, first of all, the offer is not within the scope of proper cross-examination of this witness. In the second place, I think the offer is immaterial because, in our view of the case, it does not make any difference what these people knew. But the third objection is this: second purpose stated by counsel is certainly a matter of affirmative defense on their part and has no part in connection with cross-examination. He has stated as second purpose here of showing that these arrangements came about due to the impoverishment of the plaintiff corporation and at its suggestion. I do not think I covered any such matter on direct examination. [432] I would just like to have my position known. We are going to get in such a realm of remoteness here—this is 1935—that we are going to have the 2000 exhibits if you do not look out.

(Testimony of Michael J. Curry.)

The Court: You did develop on direct examination, however, the extent of the activities of the witness on the stand.

Mr. Phleger: That is right. You are quite right.

The Court: Of course, it has not yet been demonstrated to me what the materiality of that phase of the case is.

Mr. Phleger: That is quite right.

The Court: But there were questions asked of the witness concerning the nature and extent of his position and his activities that is a material issue in the case, I suppose the other side would have a right in cross-examination to show whatever relevant facts it has to indicate that the picture drawn in that respect is not wholly as the plaintiffs have pictured it.

Mr. Phleger: I do not wish to press the point except to state again that our theory of the case, and our development of it is it doesn't make any difference what these people said or did. It would not operate to lose the plaintiff any of its rights, and hence testimony of this character is not material. What we attempted to develop was the position of this person, and these parties and officers as a basis for that legal contention.

The Court: I do not want to unduly prolong the introduction [433] of evidence in this case. It might be that a discussion of what are really the issues of the case might be profitable. I do not know. I always have a horror of getting into arguments

(Testimony of Michael J. Curry.)

in a case before all the evidence is in. Sometimes, however, it saves the building up of a record which in part is not necessary to be considered in arriving at a decision. It is sometimes difficult to distinguish between those two opposing viewpoints. From what I have heard of arguments so far in this case, not only now but at the pre-trial and other times, and the nature of the evidence, it has seemed to me it did not make any difference who these people are, whether they were good, bad, indifferent, or how their functions were carried out. It is just who they were and the positions they occupied, and from that, are there legal rights and obligations that flow in this unusual situation that is presented in this case? Maybe we will on both sides be unnecessarily considering factual matters, the resolution of which is not necessary at all.

Mr. Adams: Your Honor, just one remark. The documents I am offering are the contemporaneous record, the very evidence of the things done and the state of mind, the talents and the competence of the witness. They bear upon questions that developed upon the plaintiff's examination of Mr. Curry in that regard, and we regard the contemporaneous record as the best evidence. It is better than the testimony of witnesses can be, with regard to their own qualifications, which is a matter of [434] their own definition. The documents speak and are proof. And as I say, I do not want to labor this too much, but we have this in mind in offering the record,

(Testimony of Michael J. Curry.)

which to us is the best evidence on the basis of which these issues are going to be determined if there are any issues in the case of the character spoken of both by the plaintiff and the intervener in their opening statement.

The Court: I gather from what Mr. MacKinnon said yesterday that you have considerable other material you wish to present along that line?

Mr. Adams: That is correct, your Honor.

The Court: Unless that right arises by virtue of the relationship of the two companies, it would not otherwise arise, would it, because of the particular activities of any particular individuals who occupied positions or performed duties for either company?

Mr. Adams: We believe that to be true.

The Court: I understand Mr. Phleger to say that, too, but yet there has been evidence—you have got ahead of presenting some evidence with respect to this witness as to his personal activities.

Mr. Phleger: I think my opening statement made our position perfectly clear. We contend that the defendant took over and handled these tax matters.

The Court: You have presented the evidence along that [435] line.

Mr. Phleger: On that taking over, yes, and we have also presented evidence that those who acted in behalf of the plaintiff corporation were also acting in dual capacity for the defendant corporation.

(Testimony of Michael J. Curry.)

The purpose of that was to show that it doesn't make any difference what their knowledge was or what their activities may have been. They could not by their acts or activities or lack of activities lose the plaintiff any rights. Now, that is all laid out very carefully in our opening statement, and we consider them germane and we consider that they are proved. I therefore say that any evidence that the defendant, by way of cross-examination or otherwise, may offer to show knowledge or activities is immaterial, unless they intend to use that as a foundation to show that they made some contract or made some gift or took some other action, and even then it is not material because there is no corporate authority shown.

Mr. MacKinnon: May I be heard, your Honor?

The Court: Yes.

Mr. MacKinnon: The plaintiff, at the outset of its case, stated what I believe to be the legal issue. I told you that I thought there were four categories. The first I perceive to be a pure legal question, that is, Do they have a right to share in the tax background? That issue could have been presented without color. There has been, however, a complete selection of [436] documents by the plaintiff, not with the idea of giving your Honor the full story, not by any means, but to present the worst possible light. And I am not criticizing plaintiff for that. That is their prerogative. But that is the case they have made. They have had this witness, and this

(Testimony of Michael J. Curry.)

witness has protested vehemently that he was incompetent, that he was everything else. He said he was a figurehead in response to your Honor's question. Now, here is a concurrent series of documents and events and this proves in its entirety that this man was other than a very incompetent individual. It is the concurrent record. They have made this case. There is only one way in which the defendants can meet it, and that is to put the proof in. As long as this issue is being presented with color, your Honor has to have the full facts before you can sit in judgment. That is why all this material in my opinion is clearly competent.

The Court: Of course, there is no sinister connotation as to the fact that the witness was in a subordinate position. That does not in itself have, from a moral point of view, any dire results. It is merely a statement of fact that there was someone else that was in higher authority who directed these things to be done. I do not quite see the significance or the relevancy of whether they were competently done or not.

Mr. Adams: Your Honor, may I respond? You have heard arguments made here in Court on behalf of the plaintiff that this plaintiff corporation was in what has been described as a corporate coma, meaning in effect that its own officers, this witness on the witness stand in particular, the one who signed these returns, did so in a coma, in a mental daze, not knowing what he was doing. That I un-

(Testimony of Michael J. Curry.)

derstand to be a part of the contention made by our adversaries.

Mr. Phleger: That is not so at all.

Mr. Adams: I have heard the expression "coma" used here.

Mr. Phleger: That is right. I did not accuse any of the individuals of being in a coma. We were endeavoring to show the financial condition of the company, and it was very pertinent as part of the proof of showing that the tax matters of the plaintiff corporation were taken over and handled by the defendant and its attorneys and officers. Now you talk about sinister things. That is a fact. I am not connoting it at all. But it does bear upon the equities, and as I have said before, the only wrong that we complain of in this case is that they have not accounted to us for the fruits of all of these acts and transactions. If at the time they did this they had some sinister idea, then I think that was wrong. We make no such charge. We say they took over and they handled it, they used our property and they received this benefit and this advantage. We say they should account for it. They refuse to account for it. Therefore we say we have a cause arising under a quasi contract for the benefit or advantage that they achieved through the use of our property. Now, if they want to say that is bad, well, that is [438] their own connotation. I do not say that there was any malice or bad faith on their part, but they did take over and handle

(Testimony of Michael J. Curry.)

this matter at a time when these people were occupying dual positions, and when the plaintiff corporation, to use the language of our honorable counsel here, was an object of charity. [439A]

Mr. Adams: If your Honor please, counsel has just spoken to the effect that they took over, and he means by that, as I understand it, that the trustees, and following the trustees the reorganized company took this thing and dealt with it as their own. That I understand to be the effect of his statement. Now, I take it that when we have general officers and directors of the plaintiff corporation, as the present witness and others who will testify are, that the question is going to be fairly within the text of that argument: Is that so? We deny it, your Honor. We do not concede for a minute the primary statement made by counsel that this was anything taken, that this was taken over in any sense. The fact of the matter is that the corporation's officers and directors knew what was going on, understood what was going on, thought what was going on was right, and still think so, and that they were presently, then and there active representatives, duly performing the functions of their official positions in behalf of the plaintiff corporation.

Now, in order to attempt to prove that they made an opening examination of Mr. Curry suggesting that he did not know much about bookkeeping, that he did not know much about taxes, that he did not regard himself as the responsible head of this cor-

(Testimony of Michael J. Curry.)

poration but only as the figurehead, and so our endeavor, your Honor, is to bring to the Court the fact in regard to this witness that he was competent, that he was [440] diligent, that he was faithful, that he was able to do the things required of him in his official position in regard to this corporation, and that he did then and acted throughout in good faith.

The Court: Of course, there is no dispute, is there, Mr. Adams, really, that the same people were handling the affairs of both corporations, in a general sense?

Mr. Adams: Your Honor, may I state briefly—and I do not want to argue this; I know your Honor has heard it before—there was no duality with the reorganized company. The duality in the sense of the gentlemen occupying positions—and I understand that is what is meant by “duality”—was the fact that these gentlemen occupied positions of responsibility to the plaintiff and likewise occupied positions of responsibility to the trusteeship. That much is undoubtedly correct on record. We do contend, however, that that relation did not give rise to any of the disabilities that an interlocking arrangement between private corporations does give rise to.

Mr. Phleger: May your Honor please, this witness sat for three years and a half in the office of the attorney for this defendant corporation and was paid by the defendant corporation, and we showed

(Testimony of Michael J. Curry.)

a bill in here yesterday in which they are being charged for payment for his services, captive in the office of the attorney for the defendant and paid by [441] the defendant. Now, if that does not create duality, I do not know what does.

Mr. Adams: That is the contention that we have to meet, your Honor. That is the purpose. We propose to show that Mr. Curry was free, independent, talented, industrious and capable.

Mr. MacKinnon: And that the written record that was currently made demonstrates it right up to the hilt.

Mr. Levy: Your Honor, if the interveners may be heard so that we may be clear on the record: As your Honor noticed, I was standing here with Mr. Adams on my left and Mr. Phleger on my right, and our table is in the center, and that is about where we are. We are in the middle. And I think that is not mere hyperbole. I think that represents what is the position of the stockholders in this case, and it has been one of our troubles in presenting this case to you, and it has significance in this sense——

The Court: May I interrupt you for a moment to get something clear in my mind? You say the interveners are stockholders. Now, I take it that the attorneys for the plaintiff represent the corporation: they must represent the stockholders of that corporation.

Mr. Levy: They also represent Mr. Curry.

The Court: He is not a party to this litigation.

(Testimony of Michael J. Curry.)

Mr. Levy: No, sir, but he is their employer as the [442] president who hired them. I do not mean anything invidious by that, your Honor. I am just demonstrating to you that we who have the stockholders——

The Court: You say the stockholders. How many of the stockholders does the intervener represent?

Mr. Levy: Roughly 30,000 shares of which they are the owners.

The Court: And out of how many stockholders is that?

Mr. Levy: Well, the preferred stock is roughly 400,000 shares.

The Court: Well, now, concededly the attorneys, when they represent the corporation, represent the stockholders of the corporation also?

Mr. Levy: They definitely do, your Honor.

The Court: Now, the stockholders that they represent, are they in some different position than the other stockholders of the company?

Mr. Levy: No, but they are in a different position from that legal entity that sits up there and is known as a corporation. Let me take one moment to develop that, because there is some importance to it.

The Court: I am only asking you this question because it again brings up the matter that gave me some concern before, and that is what is the relation of these stockholders you represent? Are they old

(Testimony of Michael J. Curry.)

stockholders of the company or are [443] they new stockholders, or do they have a long-time interest?

Mr. MacKinnon: They are new stockholders.

Mr. Levy: Mr. Offerman goes back to 1942, and you know that. All of the other stockholders go back to 1944 whom we represent, and if that constitutes new, then Mr. MacKinnon isn't as aware of the corporate facts of life as I thought he was, because stockholders buy and sell in corporations.

But let me get back to the essential thing, your Honor, which I think is this: Let's momentarily go back to when this action was started. I don't go back for the purpose of emphasizing the fact that it was the interveners who started this case and not the corporation. Let's go back to the position of the stockholders at that time. When they looked at the facts about their corporation, which had had no stockholders' meetings for years other than the one when the James Foundation took over what was left of the corporation, they found that their officers, Mr. Curry and Miss Valouch, had been for most of their natural lives employees or officers of the railroad company. They found that Mr. Curry and Miss Valouch were employed in Whitman, Ransom, Coulson & Goetz with Mr. Coulson as a director of the railroad, with Mr. Coulson as the chief representative of the James interests, who owned 28 per cent of this railroad company. If they had stopped right there, as businessmen, they would have said to themselves that so far as there are any inter-

(Testimony of Michael J. Curry.)

relationships [444] between this railroad and this corporation, "we can't rely on either Mr. Curry or Miss Valouch to speak for the stockholders."

The Court: Let me interrupt you a minute. I have heard this type of argument in this and many cases before. But what is there about this representation of the plaintiffs by any of these people that is of any importance here except in connection with this tax matter? There is no claim, is there, that there was ever any conflict between the holding company and the defendant railroad company in any matters in any other respect, that there has been any conflict in interest, is there?

Mr. Levy: We are litigating the one question before your Honor only, and that is that these tax transactions——

The Court: The holding company owned the railroad company, and up to this point where the tax situation arose, I suppose it was a very happy family, because it was the same family.

Mr. Levy: Up until the Supreme Court's decision, it was a family. But after that, by all the normal laws, when a holding company is kicked out of a railroad, to put it in the vernacular, they go this way (indicating). That is the end of their marriage. But the normal laws didn't operate. Instead of going this way, they stayed just like they had been, this way (indicating), in the same offices, common attorneys, common officers. Now, there is nothing invidious [445] about that, your Honor, necessarily.

(Testimony of Michael J. Curry.)

But the fact does remain that from time immemorial the courts have said that when you have dual relationships, you create duties, and the duties, if they are breached, give rise to causes of action. We say that what has happened here is that this relationship has so colored and so deprived the corporation of its independent officers, that there was an unfair transaction that resulted, and this is it, and we are litigating it.

The Court: Well, all right, suppose that you were strangers at the time and there wasn't a complete separation of the officers and directors of the two companies, and the time came to file the affiliated return. If you were the attorney for the holding company, what would you have advised your client to do?

Mr. Levy: That is a perfectly good question. Momentarily I will assume the responsibility which I wasn't asked to do at this time.

The Court: I am not asking this for any reason but to see how far we should go in the taking of this kind of evidence.

Mr. Levy: All right, I will give a perfectly frank answer as to what I would have done as counsel, if this situation were presented to me, with my ignorance of taxes. I would have said this, and I will try not to be a hindsight general. I think I would have said this: "Gentlemen, you are asked to contribute to a company out of which you have just been evicted, a \$75,000,000 loss so

(Testimony of Michael J. Curry.)

that they may make \$17,000,000. Now, that is the nub of what you are being asked to do. The first thing you ought to do, before you say Yes or No, is to take a look at what is the purpose for which the Government of the United States, under its tax laws, has enabled two companies to file one tax return so that \$17,000,000 would be saved." And I would go get myself a good tax lawyer, if I didn't think I was qualified to do it, an independent one. And I say that had he looked at these books as we have looked at them, the tax books, he would have come to this conclusion, that the purpose of these two companies joining together in this consolidated return would be to give the parent that suffered the loss the benefit of an offset by reducing its taxes, and the tax saving would be a reduction of the loss. Now, that is what I would advise a client. Now, that is the basis for the complaint that——

The Court: I don't get that. What do you mean by that?

Mr. Levy: Let me clarify it if you don't get it.

The Court: You mean the parent company should join in the return provided that it got the benefit of the saving?

Mr. Levy: I am not getting to that, your Honor. I want to give you a full answer on this. I think it is an extremely important question, and goes right to the guts of this case, as I see it and as I have seen it for two years, and we have [447] struggled with this many nights and long days.

(Testimony of Michael J. Curry.)

Now, having concluded what is the basis for permitting the consolidated returns to be filed, and having deduced from that who should be the ultimate beneficiary of those savings, I would have turned to Mr. Adams, had he then represented the railroad company, and said to him, "Jim"—if I may be familiar for the moment, in the light of the hypothetical question—I would have said to him, "Jim, I have analyzed this tax law and I find that if any benefits that result from this consolidated return, in my best judgment the only people who are supposed to be benefited from it is the parent company, not this railroad company." Now, he would have probably turned to me and said, "Well, now, assuming for the moment that you are right, do you want me to recommend to my clients that they should join in a consolidated return and pay to you all of the benefits of this consolidated return? In other words, substitute you for Uncle Sam?" And being realistic about it, I would have said to him, "Well, Jim, I hardly think that your clients want to be Santa Claus, any more than mine. But you can't ask my clients to join in a consolidated return the purpose of which is to benefit my client, so that you may keep \$17,000,000." And I would say, "Well, then, let's sit down and look at the equities here." And then, sitting down and looking at the equities, I think that no one could conclude that it is fair or that it would have been fair for an [448] independent manage-

(Testimony of Michael J. Curry.)

ment, who have duties to stockholders, who have just lost \$75,000,000, for that independent management to say, "I will sign my name, you can have the \$17,000,000."

I have challenged Mr. Adams repeatedly, and I did it, I think, in this courtroom on the injunction motions, to give me one economic justification for this railroad company having \$17,000,000 worth of savings when every other railroad company paid taxes.

Now you ask me the question, your Honor, and I have given you what I conceive to be the answer.

The Court: So far in your argument you have completely convinced me that it hasn't been necessary for you to have introduced any of this sort of testimony that you have introduced, then, because the question resolves itself down into a legal issue, which has equitable facets to it, and what really has to happen is that the Court has to go back, project itself backwards, and say, if it has the power to do it, according to legal authority, to say what should have been the just transaction that should have been made at the time.

Mr. Levy: Let me just continue this. I agree wholeheartedly that that is one theory, and one approach, to this case. I think that the resolution of those questions as you have just posed them hasn't the slightest thing to do with whether Mr. Curry acted in good faith or in bad faith, or Mr. Coulson acted in good faith or in bad faith. Not the

(Testimony of Michael J. Curry.)

slightest. And I think that the case could stop there and your Honor could resolve that issue.

Now, we have taken lengthy depositions here in an effort to find the whole story, as you do when you take a deposition. You don't stop short on any narrow legal theory in the hope that the judge will agree with you, or if the judge doesn't agree with you, that the Circuit Court of Appeals will agree with you. So we went on to get the facts, the story, forgetting the legal conclusions. "Let's get the facts first." And when we got the facts, looked at them objectively, as objectively as we could, we thought that over, in the light of this position that you and I have just been talking about, and over and above that there were facts in this record that appear to us to require presentation on an additional theory, namely, that there was a conscious appropriation by some of the actors in this picture of this corporation at a time when a lot of people had given up the ghost for it and were willing to use it for the benefit of someone else. Now, your Honor knows that we have stressed that point of view and we have sought to present facts on that point of view.

The Court: I don't think that upon that issue any of the testimony is relevant. It may be upon the theory that Mr. Phleger advanced, that it would serve maybe to meet the defense that in the reorganization proceedings this matter should have been presented and received an adjudication there [450]

(Testimony of Michael J. Curry.)

on its merits, and that it is being presented for the purpose of showing that there was this measure of control on the part of the defendant which prevented that from being done. Upon that theory some of this evidence might possibly be admissible. But then it is only anticipatory.

Mr. Levy: Well, your Honor, when I read the cases, as you will undoubtedly do, on interlocking managements, the judgments that have resulted therefrom, I somehow have never found a court which would put a chart (indicating) in at the beginning of the opinion and say, "This man was president of one company, was president of the other, you had an interlocking board, now let's get to the legal issue." Because in all of these cases, you want to give not just the charts as they sit right there, because that is the duality; you want to give, "What are these men doing, what were they doing while they were handling these transactions?" There is a desire to know how they mentally functioned on these questions. And I think that a judge shouldn't necessarily be required to stop short on a legal presumption, such as the cases say there is, that there is a lack of undivided attention, a lack of independent judgment, hence there is a fiduciary relationship, hence there is a right to review for unfairness. Now, that is the narrow syllogism. But in all of these cases you have got to give some flesh and bone to it, both as a matter of trial presentation and as a matter of

(Testimony of Michael J. Curry.)

the judge wanting to [451] know what happened here. You have got to present the facts.

Now, I think that there is room for a second theory in this case, and a conscious overreaching is a second theory, and that then has this effect: It doesn't require your Honor to project and view this transaction from the point of view of fairness. It then says that if somebody consciously took, in breach of his duty, there is a prophylactic rule. What he consciously took, he cannot keep. He has to give it back, all of it, even though had he originally acted in a fair fashion, he might have been able to keep a part of it.

The Court: Well, I don't know whether I would follow you on that. I should think, offhand, that a right would have to exist first, because the mere manner of doing the thing wouldn't create a right unless there was a right in the first place. It might be evidence to support the right, but I don't think you can create a right out of the manner in which a thing is done unless the right existed already.

* * *

The Court: Well, I think under the state of the record, this has been an interesting discussion, of course, and it is [457] something that we will have to go over again more fully when all of the evidence is in. There is no doubt about that, because it is an interesting and unquestionably a somewhat difficult question. But I think that under the state of the record as it stands now, that the defendant is

(Testimony of Michael J. Curry.)

entitled to offer this testimony. I don't see any escape from that. I will overrule the objection.

Mr. Adams: At this time, your Honor, I will repeat the offer. I think I stated it some while back. It is an offer, as Defendants' Exhibit 3, of the exhibits identified as Railroad Company Defendant's Exhibits 131 to 138, both numbers inclusive, upon the taking of the deposition of Mr. Curry. And in making this offer, I am making the offer of the documents, including the penciled notations upon them, and upon the stipulations entered into at the time of the taking of the depositions as to the authenticity of the documents.

The Clerk: No. 3.

(Documents previously identified as Railroad Company Defendants' Exhibits 131 to 138 inclusive were received in evidence and marked Defendants' Exhibit 3.)

Mr. Adams: I will have another set shortly, your Honor, but I have one or two questions immediately.

Q. Mr. Curry, you recall, do you not, that during the years 1935 to May 1, 1944, the corporation was heavily indebted to the Chase National Bank, the Central Hanover Bank and the Curtis [458] Southwestern Company? A. I do.

Q. And that indebtedness totaled, did it not, many millions of dollars? A. It did.

Q. Do you recall that during 1941, 1942 and 1943 efforts were made to obtain funds to operate

(Testimony of Michael J. Curry.)

the corporation and to obtain those funds from those creditors? A. I do.

Q. And were those efforts successful in part?

A. In part, yes.

Mr. Adams: At this time, your Honor, and by way of amplification of the testimony just given and for the purposes to which I have previously referred in offering previous documents, I offer Railroad's Exhibits 140 to 178 inclusive, as taken upon the depositions, as Defendants' Exhibit No. 4, and I would state briefly some of the things they show.

They show the increasing financial difficulty of the plaintiff corporation. They show that the corporation received its financial assistance not only from the James interests but also from the Central Hanover and the Chase Bank, and that those institutions followed its activities closely; this being a matter which negatives any inference of domination or control by the James interests. They show that Mr. Schumacher, Mr. Curry, Mr. Nicodemus and his partner, Mr. Campbell, were [459] all thoroughly familiar with the financial problems of the corporation and were active and industrious in looking after its interest. They are offered also to show that the corporation was not in a position to pay for the independent tax counsel or the independent legal representation which the interveners apparently believed the corporation should have had.

Mr. Phleger: I object to that. I do not think

(Testimony of Michael J. Curry.)

that is proper cross-examination. He said it shows that Mr. Nicodemus and Mr. So-and-so and Mr. S-and-so else knew this, that and all the rest. It is remote in time. It is something like 48 exhibits now that he is dumping in in one offer. It seems to me matter of this kind should be presented as part of the defendant's case. I do not think they have any impertinency whatever.

Mr. MacKinnon: It goes to the credibility of this witness and this material has been selected with that purpose in mind.

Mr. Adams: And for the other purposes stated.

The Court: You say it goes to the credibility of the witness. In what respect? On what subject?

Mr. Phleger: If that is the purpose of it, it should be presented to the witness. You cannot dump in 48 exhibits and say it goes to the credibility of the witness. You must confront him with them.

Mr. Adams: Written current documents, your Honor, will show that this witness was right in the middle of every corporate step that was had, that he was an active participant, that not a single thing was done with respect to corporate management that he was not right in the middle directing it.

The Court: He has not said very much to the contrary.

Mr. MacKinnon: He said he was just a figure-head.

The Court: Maybe I am to blame for asking the

(Testimony of Michael J. Curry.)

question in [460] that form. He has also in answer to questions stated he was the office manager and he was familiar with the various matters that had to do with the fiscal and other effective functions.

* * *

Mr. Adams: In response to plaintiff's questions directed to that end. In any event, he is here. Those suggestions have been advanced in his opening statement, and we seek to prove in the best fashion we can the activities and competence of the witness.

The Court: You have a perfect right to cross-examine the witness concerning the nature of the activities which he has testified to on direct examination, but I do not think you can put in a whole bunch of exhibits, some of which have nothing to do with that matter. It may serve, and properly so, to sustain some of your other contentions in the case. That is the only point that is before us at this time. [470]

* * *

Q. Now, Mr. Curry, referring to the document identified as Railroad Defendant's Exhibit 140, a memorandum of January 11, 1941, is that a document which you prepared at or about its date?

A. Yes, sir.

Q. And the endorsement at the upper lefthand corner is Mr. Schumacher's initials upon it?

A. His initials—stamped initials, yes.

Q. No, in the upper lefthand corner in blue pencil, do you not find Mr. Schumacher has writ-

(Testimony of Michael J. Curry.)

ten—that is correct—“M.J.C.,” your initials, that is correct, is it not?

A. Yes, “M.J.C.” with a question mark.

Q. And you have marked in your handwriting, “discussed January 13, 1941”? [471]

A. Correct.

Q. Was that a discussion with Mr. Schumacher that you had?

A. Along the lines of the memorandum, yes.

Q. And you signed the memorandum on the bottom?

A. I initialed it, yes.

Q. Turning to the next paper, which is Railroad Defendant’s Exhibit No. 141, is that a document which was produced from the files of the Western Pacific Railroad Corporation?

A. It is.

Q. That is a copy——

A. A copy.

Q. A copy of a letter addressed by Mr. Schumacher to Mr. Coulson under date of January 14, 1941?

A. Yes, sir.

Q. With a notation of a blind copy to Mr. Nicodemus?

A. Yes, sir.

Q. Beyond the identification of the document as one produced from the files of the plaintiff corporation, do you have any present recollection of it?

A. Yes.

Q. Please state your present recollection.

A. Well, my present recollection is that Mr. Schumacher discussed the question of the cash situation of the corporation with the Central Hanover Bank.

(Testimony of Michael J. Curry.)

Q. And you discussed that matter with Mr. Schumacher and were [472] familiar with it in a general way? A. In a general way, yes.

Mr. Adams: Your Honor, perhaps I should say what I have in mind is to offer this in a group, but on further thought it might be simpler to deal with them one by one and we can dispose of them one by one so that counsel may be afforded an opportunity to object singly and not have too complex an objection. So if I may go back to the document identified as Railroad Co. Defendant's Exhibit 140, being a memorandum of January 11, 1941, I now offer that document as Defendant's Exhibit 4.

The Clerk: Do you wish these marked in a series, 4A, 4B, and so forth?

Mr. Adams: Yes.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 4A.)

Mr. Adams: Referring to a document identified as Railroad Defendant's Exhibit 141, a letter from Mr. Schumacher to Mr. Coulson, dated January 11, 1941, I will offer that as Railroad Defendant's Exhibit 4B.

Mr. Phleger: If your Honor please, with respect to that, that is letter from Mr. Schumacher to Mr. Coulson.

Mr. Adams: The witness has testified with regard to his general acquaintance with the subject matter.

(Testimony of Michael J. Curry.)

Mr. Phleger: Yes, but I do not think that is proper cross-examination. He can ask the witness whether this matter was [473] discussed and he would say yes. You do not have to put in the letter. May it please your Honor, during the recess I went through these. There are not more than two or three out of these 38 odd items that are letters or memorandums made by this witness.

Mr. Adams: I wonder if we can submit them one by one?

The Court: I do not see the point of cross-examining the witness on this letter. It may be material with respect to the subject matter of the letter, as a part of your case, but in the cross-examination of this witness I do not think that is correct.

Mr. Adams: May I develop the offer?

The Court: Yes.

Q. (By Mr. Adams): Referring to Railroad Defendant's Exhibit 141, I direct your attention to the second paragraph on page 1 of the letter. You have it before you.

A. The copy of the letter of January 14?

Q. 1941. A. 1941?

Q. Yes.

A. That is Railroad Co. Defendant's Exhibit 141?

Q. Right. You have that before you?

A. I have it before me.

Q. I direct your attention to the second para-

(Testimony of Michael J. Curry.)

graph of that letter on the first page, and reading the third sentence of that paragraph, "This was brought about through conference our [474] treasurer Mr. Curry had with Olyphant, vice president of the Central Hanover, and in accordance with resolution adopted at meeting of Board of Directors on January 10, 1935."

Q. Directing your attention to that portion of the letter, and asking your attention to the letter, do you recall at this time that the matters spoken of in the letter were brought about by your conference with Mr. Olyphant? A. Yes.

Mr. Adams: I will offer the document, your Honor.

The Court: Any objection?

(No response.)

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 4B.)

Q. (By Mr. Adams): The next document, Mr. Curry, is Railroad Defendant's Exhibit 142, being original letter of August 7, 1941 addressed by Mr. Coulson to Mr. Schumacher. Was this document produced from the files of the plaintiff corporation?

A. It was.

Q. Were you familiar with the matters that are stated in this letter at or about its date?

A. I know generally the matters mentioned, but this letter does not indicate that I saw it at the time of its receipt.

(Testimony of Michael J. Curry.)

Q. There is nothing upon that particular letter that indicates that you saw this particular letter?

A. There is nothing to indicate it came to my attention. [475]

Q. You notice the letter speaks of the fact that since 1936 there has been advanced to the corporation something over \$200,000 by the Western Realty Company?

A. Yes, sir.

Q. Were you familiar with that?

A. Yes, I was familiar with the advance.

Q. Were you familiar also with the fact that the stock of the company was all held by the Curtiss Southwestern Company as collateral?

A. With the stock of the Western Realty Company——

Q. Yes? A. I was familiar with that.

Q. And the fact that it was an under-collateralized loan which was in default?

A. I can't say as to that at this time.

Q. There was some time when that loan came in default to your knowledge, was there not?

A. Well, I am not so sure that that was under-collateral.

Q. I was speaking of the matter of its being in default. Do you recall that that loan became a default?

A. Yes.

Q. There was a time, was there not, when the loan was substantially under-collateralized?

The Court: I do not quite see the point of this.

(Testimony of Michael J. Curry.)

Mr. Adams: This is part of the corporation's financial [476] troubles, your Honor.

The Court: The witness has already testified that he had a general familiarity with all the financial affairs.

Mr. Adams: That is right, your Honor.

The Court: That, I do not think, makes any difference.

Mr. Phleger: May I point out, your Honor, that this is a letter from Mr. Coulson to Mr. Schumacher? The witness has said that he does not recall ever having seen it, and defendants then make it the basis of a series of questions of this witness with the idea it will be put in evidence. I think that is wholly improper. It is not proper cross-examination.

The Court: Do you object to it upon that ground?

Mr. Phleger: Yes.

The Court: I will sustain it.

Mr. Adams: Very well, your Honor. Will you hand the document to the Clerk, please?

The Court: Do you want that identified in some way?

Mr. Adams: Yes, your Honor. May the record show the ruling just made sustained an objection to the offer of the document identified as Railroad Co. Defendant's 142.

The Court: We will mark it 4C for identification so the record will show what it is we have been talking about.

(Testimony of Michael J. Curry.)

(The document was thereupon marked Defendant's Exhibit 4C for identification.)

Q. (By Mr. Adams): Now you have Railroad Co. Defendant's [477] Exhibit 143, next in order, Mr. Curry? A. Yes, sir.

Q. That is a copy of a letter produced from the files of the plaintiff corporation? A. Yes.

Q. Addressed by Mr. Schumacher to Mr. Coulson under date of August 14, 1941? A. Yes.

Q. Is there anything upon that letter which would enable you to say whether or not you saw the letter at or about its date? A. Yes.

Q. What is that, please?

A. The underscoring of this date "August 11" with my green pencil.

Mr. Adams: With that identification, your Honor, I offer the document as Defendant's Exhibit 4D.

Mr. Phleger: May it please your honor, this is a letter from Mr. Schumacher to Mr. Coulson dated August 14, and he is proving that the witness saw the letter. I do not think that is proper cross-examination. I do not think it is any pertinent evidence. I spent days trying to get these exhibits down to a reasonable compass so they would not overburden and overwhelm the Court. I do not think this is proper. If he wants to ask the witness whether he knew about certain things, the witness can answer. [478]

(Testimony of Michael J. Curry.)

Mr. Adams: The witness saw the document at the time and therefore it is a part of the witness' transactions.

Mr. Phleger: But he does not even characterize the document.

The Court: Counsel, what difference does it make whether the witness saw the document or not?

Mr. Adams: He shows his familiarity with all the transactions the corporation had at that time, your Honor. This is a part of that proof.

The Court: What does that involve, the familiarity of the witness with the transaction?

Mr. Adams: And participation, your Honor. The question has been raised by the affirmative proof offered here by the plaintiff, upon examining this witness, as to the attention and competence of Mr. Curry, the things he was able to do, the things that he did. It has even been suggested here that he was a kept man.

Mr. Phleger: He stayed in Coulson's office for three and a half years.

Mr. Adams: My own statement, then, meets with the same view that our adversary states. I am endeavoring to show that, far from being a person of that character, this man at all times was most diligent in looking after the affairs of the corporation.

The Court: I do not think that there has been anything to the contrary developed.

Mr. Adams: The assertion is that he was a kept

(Testimony of Michael J. Curry.)

man, the [479] inference being, therefore, that he was in possession or control of his adversary.

The Court: Is this during the period when the tax returns were prepared?

Mr. Clark: No, your Honor, this was in 1941.

Mr. Phleger: This is in 1941. The period he was in Mr. Coulson's office commenced in May, 1945, and ended December of last year, and the characterization is counsel's own. I have made no such assertion. I proved the fact that this witness was paid by the Coulson firm and in its office from the middle of 1945 until the end of 1948. I do not see what it has to do with the point we have under discussion, and it is your own characterization and not mine.

Mr. Adams: Then it should be withdrawn because I understood it to be my adversary's. Certainly I do not make that characterization. I propose to prove to the contrary, that at all times he was independent.

The Court: I suppose we ought to get some semblance of order out of this. I think I should be inclined to hold, Mr. Adams, it would be incompetent, irrelevant and not proper cross-examination to exhibit a series of documents to the witness during the period up to 1943 and ask him whether or not he saw these documents in the course of the performance of his duties. I do not see any point in my having before me a record of every transaction, letter and document that passed under this

(Testimony of Michael J. Curry.)

witness' [480] nose except at some critical time that is involved in this litigation.

Mr. Adams: That is not the purpose, your Honor, to put before your Honor a record of every transaction that Mr. Curry dealt with. These are the selected transactions that we considered material and relevant to issues in the case that are brought forward by our adversary.

The Court: Suppose the witness read a letter that his superior wrote and was familiar with it in 1941: What has that got to do with this case?

Mr. Adams: It depends upon the subject matter of the letter, your Honor.

The Court: No matter what the subject matter was, what difference does it make? He might have been a good man in 1941 and a bad man in 1943. I am just saying that colloquially. What has it got to do with this particular matter?

Mr. Adams: This witness has been examined as to his competence. It certainly deals with that matter, his competence in financial affairs. Further, it has to do with the contention that is advanced both by the interveners and, I understand, to the same extent by the plaintiff, that these gentlemen were in control of their adversaries.

The Court: But your opponents' evidence was confined to this period between 1943 and 1945. Now, that is the same old argument that is made in a lot of cases: This man was a good man at [481] some other time. We get that in criminal cases.

(Testimony of Michael J. Curry.)

He did not beat his wife, even though he might have forged his checks. What is the competence of that?

Mr. Adams: Your Honor has been told in June of 1943 the trustees took over the entire payroll, for instance, covering Mr. Curry's salary and so on—even, they say, the salaries these gentlemen received when they were officers of the plaintiff corporation—and they point that out to your Honor with a good deal of emphasis that it is significant. These things show the background.

The Court: I can save you a lot of worry on that score. I heard the witness on the stand so far and I am satisfied that he is a perfectly competent man, intelligent, and probably a pretty good railroad man. We could get into an academic discussion on that subject in connection with the particular issues that we have here; so that I do not think you need to labor the point by putting in 40 odd exhibits to show that Mr. Curry knew what was going on and participated in the affairs of the railroad company and advised concerning them during the period of time that you are referring to. That I do not think there is any necessity to do. [482]

* * *

Mr. MacKinnon: I would like to make this statement. You say with respect to the time in question. I am turning to page 295 of the record. Now, this is when he became president. That is February 1, 1942: (reading)

(Testimony of Michael J. Curry.)

“Q. Did you engage in any discussions of policy matters personally in the directors’ meetings?

“A. I did not.”

This goes back to '42. But there is interrogation prior to that time, and it is perfectly proper that your Honor asked him the question whether he considered himself a figurehead. All this is designed to prove that when he says that, it just isn't so.

The Court: Well, I was intending my inquiry to be directed toward the period with which we are concerned. I don't care whether he was a figurehead in 1927 or 1934 or not. What difference does it make?

Mr. MacKinnon: Well, if the plaintiffs want to limit the issues, and the interveners, we will meet whatever issues they present. But let them frame them.

Mr. Clark: May it please your Honor, in order to obviate this very thing, at the pre-trial conference we specifically limited these issues and stated it in letter form, because the original pleadings necessarily were broad. We limited the period to that commencing March 15, 1943, because we [489] realized on the discovery proceeding, under the broad issues, that this material covered clear back, in some instances, to 1917. So in order to present the case to your Honor, we specifically limited the period of time to that commencing March 15, 1943, which is the date adopted by Mr. Phleger in his presentation as the start of the period.

(Testimony of Michael, J. Curry.)

Mr. Adams: Your Honor, a good deal of time has been consumed, occasioned no doubt by the view I had that it was appropriate to offer papers to which various and sundry objections, some of them found good by your Honor, have been made. I suggest in the interest of saving the Court's time and trying to get ahead with the case, that, it being now about closing time, we see what we can do with the papers so as to bring the matter before your Honor tomorrow morning in a way that we, from our standpoint, will think is most conducive to moving along and not absorbing too much time. I think we have your Honor's general views, and we will try to conform to them. Where we have different views, we will simply go through the appropriate procedure of making the offer and having a ruling. If your Honor feels that that is a good plan to follow, I think it will save some time.

The Court: Well, I will say to you, so that there cannot be any misunderstanding about it, that anything that this witness testified to in direct examination, be it of a preliminary or other nature, I am not giving any consideration to that [490] except as to the period that is involved here. And as to that, you can examine him. Now, merely because he testified that he was the president, became the president or occupied such and such an office in 1940 or 1939, and that at that time he only did so and so in connection with his activities, doesn't mean that that opens up on cross-examination to a

(Testimony of Michael J. Curry.)

showing that at that time he did something else; because even though he may have been mistaken at that time, when we are on the subject of credibility of witnesses in the cross-examination, we confine ourselves to the material periods. A man may have testified falsely or made a mistake with reference to some other period, but unless it is material to the issues in the case, we don't pay any attention to it. We tell juries that constantly, in cases tried in these courts, that they are entitled to disregard the testimony of a witness who has testified falsely in a matter that is material to the issue of the case. A man may have said, "I was born in 1892," when in fact he was born in 1885. If that hasn't got anything to do with the case, all right, he made a mistake or testified falsely. But it isn't germane to the case. So that what is the good of our taking up time here at this stage of the proceeding in connection with this witness' testimony on matters that haven't got to do with the material part of the direct examination?

I think you should confine yourself to the presentation [491] of any documents, in your cross-examination, that you want, or to the exploration of facts that were testified to in the periods with which we are concerned—unless there is some other tie-up that I can't conceive of at the moment that might make some inquiry into prior times proper. [492]

Tuesday, February 8, 1949—10:00 a.m.

MICHAEL J. CURRY

Cross-Examination

(Resumed)

By Mr. Adams:

Q. Mr. Curry, do you recall that in March, 1943, after the Supreme Court decision in the Western Pacific Reorganization case, the creditors of the plaintiff, the parent corporation, finally refused to provide further funds to pay the current expenses of the plaintiff corporation? A. I do.

Q. Do you recall that in June, 1943, an arrangement was made for the reorganization trustees to pay all of the current expenses of the New York office from then on? A. Yes, I do.

Q. Did the corporation at that time have any other source available to it from which it might obtain funds to pay those operating expenses?

A. No, sir.

Q. Did Mr. Schumacher discuss this arrangement with you?

A. The arrangement for the taking over by the company? Is [496] that what you are referring to?

Q. The expense take-over in June 1943.

A. He talked to me after he came back to San Francisco, yes, and the arrangement had been made while he was out there.

Q. Did you discuss the idea with him before he went to San Francisco? A. No, sir.

Q. It is a fact, is it not, Mr. Curry, that shortly

(Testimony of Michael J. Curry.)

before that you did discuss with Mr. Schumacher the fact that the corporation was just about out of all money and had no resources to which to go?

A. That is right.

Q. Do you know who first suggested the possibility of obtaining the current expenses from the court's trustees?

A. It is my impression it originated with Mr. Schumacher.

Q. Do you recall whether you had any discussion with Mr. Nicodemus or his partner, Mr. Campbell, about the arrangement?

A. I did not, no, sir.

Q. Were the directors of the corporation in general informed as to its financial condition about the middle of 1943?

A. It is my recollection they were.

Q. Did any one at any time suggest to you that there was any impropriety in arranging for the trustees to pay all of the expenses of the New York office?

A. No, sir. [497]

Q. Did it occur to you that there might be anything inappropriate in doing that?

A. It did not.

Q. Do you believe now that there was anything inappropriate in making that arrangement?

Mr. Phleger: Just a moment. I object to that as calling for the conclusion of this witness. His present state of mind certainly is not a factor in this case.

(Testimony of Michael J. Curry.)

Mr. Clark: And incompetent, irrelevant, and immaterial, your Honor.

The Court: I will sustain the objection.

Q. (By Mr. Adams): When this arrangement was made in June 1943, did it occur to you that it would in any way affect the loyalty of the corporation's officers and directors to the corporation?

A. It did not.

Q. Did anyone make such a suggestion to you?

A. No, sir.

Q. So far as you know, was the loyalty of the corporation's officers and directors to the corporation in any way affected by that arrangement?

A. No.

Mr. Phleger: Just a moment. That calls for the conclusion of the witness.

The Court: Well, it does. You can ask him what, if anything, was said or done in that regard [498]

Q. (By Mr. Adams): Was anything said or done, Mr. Curry, to your knowledge, which indicated in any way that the loyalty of the corporation's officers and directors to the corporation was affected or impaired by that arrangement?

A. Not to my knowledge.

Q. Mr. Curry, you recall that you became president of the plaintiff corporation in early 1942?

A. February 1, 1942.

Q. After you became president of the corporation, from whom did you seek advice with regard to its problems?

(Testimony of Michael J. Curry.)

A. Up to the time that Mr. Schumacher retired, in May 1942, I sought his advice as well as our counsel's advice, Mr. Nicodemus.

Q. You did consult with Mr. Schumacher and with Mr. Nicodemus?

A. Every step that was taken after I became president was done after consultation with either or both, Nicodemus and Schumacher.

Q. And Mr. Nicodemus and his firm, the firm of Pierce & Greer, were the counsel to the plaintiff corporation? A. That is correct.

Q. And you have consulted with them as such counsel? A. I did.

Q. And Mr. Campbell was at the time, also, was he not, a director of the plaintiff corporation?

Strike that.

Mr. Adams: Your Honor, I think the exhibit is in evidence, and that will be the best evidence of that fact. [499]

Q. (By Mr. Adams): Do you, Mr. Curry, recall just when it was when Mr. Campbell retired from the directorship of plaintiff corporation?

A. I don't recall the exact time, no.

Q. Now, did you also discuss the corporation's problems with Mr. Osborn from time to time?

A. From time to time, yes.

Q. And did you discuss them with Mr. Wood?

A. Yes.

Q. And did you receive advice from the members of your organization?

(Testimony of Michael J. Curry.)

A. From the directors?

Q. If that is your answer, Mr. Curry, state it that way.

A. Yes, sir.

Q. All right. You recall, do you not, that Mr. Nicodemus and the firm of Pierce & Greer were engaged as counsel to the corporation in the year 1934?

A. Yes, sir.

Q. Do you know at whose suggestion Mr. Nicodemus and his firm were engaged in that capacity?

A. At Mr. Schumacher's.

Q. Is it your understanding that Mr. Schumacher had known Mr. Nicodemus prior to that time?

A. Yes.

Q. And from that time, 1934, did Mr. Nicodemus and his firm [500] also represent the railroad company and the other members of the Western Pacific group?

A. Yes, sir.

Q. And do you know at whose suggestion Mr. Nicodemus and his firm undertook the representation of the members of the group other than the corporation?

A. At Mr. Schumacher's, I recall.

Q. And is it the fact that the firm's engagement, both in the capacity of counsel to the corporation and also in the capacity of counsel to the railroad company, was approved by resolution of the Board of Directors of each of those concerns?

A. It is my recollection they were.

Q. During the period from 1934 until 1942, was Mr. Nicodemus frequently in the New York office?

(Testimony of Michael J. Curry.)

A. Yes, sir.

Q. And when we speak of the "New York office," we mean the joint office you have spoken of heretofore? A. Yes, sir, 37 Wall Street.

Q. Was Mr. Schumacher frequently in communication with Mr. Nicodemus or his partner, Mr. Campbell? A. Yes, he was.

Q. Were you from time to time in communication with Mr. Nicodemus or Mr. Campbell?

A. I was.

Q. After you became president of the corporation, did you rely [501] on Mr. Nicodemus and Mr. Campbell for advice on legal matters?

A. Absolutely.

Q. Did you frequently communicate with them upon such matters? A. I did.

Q. What would you say, Mr. Curry, as to whether or not Mr. Nicodemus and Mr. Campbell were generally well informed with regard to the affairs of the corporation?

A. I would say they were.

Q. Do you know of any major problems of the corporation of which they were not informed? And I am speaking now of the time since you became president.

Mr. Phleger: Just a moment, I think that is objectionable as calling for the conclusion of the witness.

The Court: Yes, I will sustain the objection to the last question.

(Testimony of Michael J. Curry.)

Q. (By Mr. Adams): Do you recall receiving tax advice from Mr. Nicodemus and Mr. Campbell in connection with the franchise taxes of the plaintiff corporation? A. I do.

Mr. Adams: Now at this time, your Honor, I will hand the witness a document identified as Railroad Defendant's Exhibit 726 upon taking of the depositions, being a letter, or a copy of a letter, from Mr. Curry to Messrs. Pierce & Greer, dated May 20, 1943.

(Document described above was handed to the witness through [502] the Clerk.)

Q. (By Mr. Adams): Mr. Curry, do you recall that this is a copy of a letter produced from your files which you wrote to Messrs. Pierce & Greer on May 20, 1943? A. Yes.

Q. And will you note the handwriting endorsement on the bottom of the letter, reading:

"Mr. Campbell suggested that we make reply stating that the corporation does not file New York State franchise tax.

M.J.C., 5/24/43."

Did you endorse that on the letter on or about that date? A. I did.

Q. And do you recall that that was a memorandum you made of the advice you received from Mr. Campbell at or about that time? A. Yes, sir.

Mr. Adams: I will offer the document in evidence as Defendant's 5A.

(Testimony of Michael J. Curry.)

(Letter dated May '20, 1943, from Mr. Curry to Messrs. Pierce & Greer, was received in evidence and marked Defendant's Exhibit 5A.)

Mr. Adams: Now at this time, your Honor, I will hand to the witness certain letters dealing with taxes, tax matters, of plaintiff corporation, which I will describe as follows: [503] Railroad Defendant's Exhibit 729, as introduced upon the deposition, 730, 731 and continuously through to No. 740. These documents I shall expect to offer in a moment as Defendant's 5B, and I will describe them briefly. The first is a letter of May 18, 1944, addressed to Mr. Curry by Whitman, Ransom, Coulson and Goetz.

Mr. Phleger: Mr. Curry, in what capacity?

Mr. Adams: It appears on the face of it, "Mr. M. J. Curry, Vice-President, Western Pacific Railroad Company, 37 Wall Street, New York, New York."

Mr. Phleger: That is the defendant company.

Mr. Adams: Subject to any commentary as to the reorganized company, that is correct.

The next letter, May 23, 1944, addressed by Mr. Curry to Mr. Nicodemus, and inclosing a copy of the letter just previously referred to.

The next letter, a letter of June 14, 1944, addressed by Mr. Nicodemus to Mr. M. J. Curry, President, the Western Pacific Railroad Corporation, being a response to the last preceding letter from Mr. Curry to Mr. Nicodemus.

The next letter, a copy of a letter from Mr. Curry

(Testimony of Michael J. Curry.)

to Messrs. Pierce & Greer, of October 5, 1944, referring to the same subject matter, the subject matter of all these letters up to this point being the New York State Franchise Tax. [504]

The next letter, a letter from Mr. Brua Campbell, on the letterhead of Pierce & Greer, to Mr. M. J. Curry, President, The Western Pacific Railroad Corporation, responding to the letter last mentioned.

Mr. Phleger: Will you note the fact that on the last item the receipt stamp is a receipt by the Western Pacific Railroad Company, although the letter is addressed to the Western Pacific Railroad Corporation?

Mr. Adams: That is correct.

The next letter, copy of letter from Mr. Curry to Messrs. Pierce & Greer, dated March 26, 1945, and so far all these letters refer to the New York State franchise tax.

The next letter, a form letter addressed by Tri-Continental Corporation to Western Pacific Railroad Corp., which is included in this list because it is referred to in other documents.

Mr. Phleger: Will you note that the receipt on the top of it, although the letter is addressed to the railroad corporation, the receipt is that of the Western Pacific Railroad Company?

Mr. Adams: That is correct. The document so shows.

The next letter, a letter of April 9, 1945, ad-

(Testimony of Michael J. Curry.)

dressed by Mr. Nicodemus to Mr. Curry as President of The Western Pacific Railroad Corporation, refers to the letter last mentioned, and contains this paragraph:

“My suggestion is that you call Mr. James K. Polk [505] and ascertain whether any of the James corporations are concerned with the same request that has been made by the Tri-Continental Corporation and be guided by his recommendation as to the answer to be made pursuant to this inquiry.”

Mr. Phleger: Mr. Adams, will you also please state or admit that the stamp on that letter is the stamp of receipt by Western Pacific Railroad Company, although the letter is addressed to Mr. Curry as President of the Western Pacific Railroad Corporation?

Mr. Adams: All these things appear on the face of the documents I am offering. That, of course, is correct.

Mr. Phleger: That is not the point. The point is as you characterize these documents I take it you are assuming to state the essential and important facts. You take great care to point out that the letter is addressed to Mr. Curry as President of the corporation, and I think it important and pertinent to state that the receipt is in the name of the company. I think that is important.

Mr. Adams: Mr. Phleger's view as to what is important——

Mr. Phleger: I would not interrupt if I did not think it was important.

(Testimony of Michael J. Curry.)

Mr. Adams: I take it Mr. Phleger would not interrupt if he did not regard it as important. I have called to the Court's attention the designation of Mr. Curry when a letter was [506] addressed to him because in the case Mr. Phleger pointed out there was a letter addressed to him as Vice President of the railroad company.

The next letter is a copy of a letter from Mr. Curry of April 10, 1945, addressed to Mr. James K. Polk of Messrs. Whitman, Ransom, Coulson & Goetz and refers to the Tri-Continental form letter of March 23, 1945 and says:

"I referred this to Mr. Nicodemus of counsel for this corporation for advice as to nature of reply to be made and he suggests I ascertain from you whether any of the James corporations are concerned with the same request that has been made by the Tri-Continental and advise me, if you will, please, as to answer to be made to the inquiry."

The next letter is one of April 11, 1945, addressed by Mr. Curry to Tri-Continental Corporation, and I will read it and the endorsement upon it:

"In response to your letter of March 23 this is to advise that The Western Pacific Railroad Corporation did not file a New York state franchise tax report during the year 1944.

"Yours very truly,

B.C.C. Mr. F. C. Nicodemus, Jr.

"See your letter of April 9. The above letter was written on suggestion made by Mr. Polk over the phone [507] today."

(Testimony of Michael J. Curry.)

The next letter is one of April 23, 1945, addressed by Mr. Curry to Messrs. Pierce & Greer, attention Mr. F. C. Nicodemus, Jr., and I will read it:

“I will refer you to my letter of October 5, 1944, your reply dated October 11, 1944, in regard to the franchise tax imposed by Article 9-A of the amended New York tax law.

“As the first return required to be made will be due May 15, 1945, which date is rapidly approaching, I would appreciate your prompt advice as to what should be done in the matter so far as the Corporation is concerned.

“Mr. Polk of the firm of Whitman, Ransom, Coulson & Goetz, as I understand, has this question under consideration and I suggest you consult him in the matter.

“Yours very truly,

“Copy to Mr. James K. Polk,

“Whitman, Ransom, Coulson & Goetz.”

And the last one on the list is a letter, a copy of letter of April 26, 1945, addressed by Mr. Curry to Messrs. Pierce & Greer, referring to his of April 23, and quoting for Mr. Nicodemus' information an item which appeared in the New York Times on the New York State tax, with copy to Mr. James K. Polk. I will ask the clerk to hand these letters to Mr. Curry so that he [508] may identify them.

Q. Mr. Curry, will you please look at each of those documents, being marked consecutively Rail-

(Testimony of Michael J. Curry.)

road Defendant's 729 to 740, both numbers inclusive, and state whether or not the documents were produced from your files.

Mr. Phleger: Just a moment. When you say "your files"——

Mr. Adams: That is a fair question, and I will ask Mr. Curry to designate what files in answering the question.

Q. Where are the files now located?

The Court: Why take all the time of the witness looking through these? Is there any question about where they were produced from?

Mr. Phleger: No.

The Court: Where were they produced from?

Mr. Adams: My understanding is that these documents were all produced from the files of the Western Pacific Railroad Corporation.

The Court: Is that correct?

Mr. Phleger: I would not dispute that.

Mr. Clark: Located, though, your Honor, in the offices of Whitman, Ransom, Coulson & Goetz.

Mr. Phleger: The testimony already shows that. That is where the files were.

Q. (By Mr. Adams): It would appear they were there from about June 1, 1945, to some date in September 1948, as I understand it; [509] that is correct, is it not, Mr. Curry?

A. I beg your pardon?

Q. The corporation's files during the period from the time you entered in the office in the suite

(Testimony of Michael J. Curry.)

of Whitman, Ransom, Coulson & Goetz in June 1945, remained in your office and there until you removed them from that place in September of 1948?

Mr. Phleger: Just a moment. This assumes a fact which is contrary to the evidence. Exhibit 2 shows that the tax files are still there.

Mr. Adams: I am speaking of the corporation's files from which these documents were produced, and I think Mr. Curry understands this.

Mr. Phleger: We want the record to be clear.

Mr. Adams: Surely. We are both cordially in agreement about that.

Q. Mr. Curry, you were asked generally about the corporation's files. Do you recall Mr. Phleger asked you some questions on your direct examination? A. Yes.

Q. Are these the facts, that the corporation's files, excluding Federal income tax files and Federal excess profits tax files, exclusive of such files were the corporation's files after the New York office was closed removed to your office in the suite of Whitman, Ransom, Coulson & Goetz?

A. That is correct. [510]

Q. And did you from that time forward have those files in your office in that suite?

A. I did.

Q. And you had control over them?

A. I did.

Q. And you had keys to those files?

A. There were really no keys—well, yes, there

(Testimony of Michael J. Curry.)

was one key that locked all the files, that is right. I had charge of that.

Q. You had charge of those files. And is it the fact that they remained there in that office until, at Mr. Coulson's request, you vacated that office?

A. That is correct.

Q. When you vacated that office you referred to the fact that those files were removed from that office?

A. I did.

Q. And taken to your new office as president of the corporation?

A. I did.

Q. That is correct, is it not?

A. That is correct.

Q. And all of these papers were produced from those files, is that the fact?

A. That is my belief, looking these over.

Mr. Adams: I will offer the documents upon the stipulations previously entered. Excuse me, Mr. Curry. Did you want to say something further? [511]

The Witness: Inasmuch as they are tax matters, I am not so sure that they were taken out of my general file. Some of them may have been in the tax files.

Mr. Adams: I think the depositions identify the documents, but if there is any question about it, your Honor, as to the source from which these papers were produced, I would have to refer back to the depositions, and at which time stipulations were made on each of these papers, and we will

(Testimony of Michael J. Curry.)

identify the source from which they were produced. I would like to make the offer of this exhibit, which is Defendants' 5-B, upon the stipulation that was entered into at the time of the taking of the depositions, of the authenticity of the documents and the fact that letters were sent and received at or about their dates.

(The letters referred to were received in evidence and marked Defendants' Exhibit 5-B.)

Mr. MacKinnon: As one exhibit, Mr. Adams, 5-B?

Mr. Adams: As one exhibit.

Q. Mr. Curry, do you recall receiving tax advice from the firm of Pierce & Greer concerning the capital stock tax of the plaintiff corporation?

A. I do recall, yes.

Q. Do you recall corresponding with Messrs. Nicodemus and Campbell, and also with Mr. Polk in connection with that subject matter? [512]

A. Yes.

Mr. Adams: At this time, if your Honor please, I will hand to the witness letter of January 11, 1943, addressed by Moody's Investors Service to Mr. T. M. Schumacher, Trustee, Western Pacific Railroad Co., 37 Wall Street, New York City, wherein—

Mr. Phleger: Have you the number, please?

Mr. Adams: Oh, yes. Railroad Defendant's 439.—wherein the following appears:

(Testimony of Michael J. Curry.)

“In analytical work, dealing with railroad securities, the Federal income tax liability (past, present and future) and the correct method of computation based on accurate knowledge of the various basic factors is today more important than ever. We in our work here at Moody’s have naturally had to make estimates, but sometimes, due to inadequate knowledge of the facts, our tax calculations have not been as accurate as we would wish. We wonder if you would be willing to be of help to us regarding the above, and on the possibility that you would, we are returning a tax form, a return of which, filled out (even on a tentative basis) would be of great assistance. We should be glad to hold any information furnished us in confidence if you desire.”

And there is attached to this letter a list of particular items of the character described. In connection with that [513] letter I will also hand to the witness a copy of a letter dated January 13, 1943, addressed to Mr. Walter F. Hahn, Manager, Railroad Department, Moody’s Investors Service, signed M. J. Curry, and containing in part these statements:

“Your letter of January 8, addressed to Mr. T. M. Schumacher, Trustee, has been turned over to the undersigned for reply.

“As the Western Pacific Railroad Company is included in the consolidated income and excess profits tax returns filed by the Western Pacific Rail-

(Testimony of Michael J. Curry.)

road Corporation (parent company), we show below estimated consolidated figures of which the companies pre-tax net income is \$15,290,248."

And then there follows some computations, the last line of which is:

"Accrued in 1942—estimated, \$3,693,994."

And then follows:

"No provision has been made for accrual of excess profits tax since it appears whatever excess profits net income there may be will be more than offset by the excess profits credit and the unused profits credit carryover."

"It will be appreciated if you will treat the above information confidentially."

I will ask the clerk to hand these to Mr. Curry. [514]

(Two letters handed to the witness by the clerk.)

Q. (By Mr. Adams): Do you recall the fact that Mr. Schumacher handed you the Moody's letter, Mr. Curry, for reply? A. I do.

Q. And is Railroad Defendant's Exhibit 440 the reply which you made to Moody's with respect to its inquiry? A. Yes.

Mr. Adams: I will offer the documents, your Honor, as Defendants' 5-C.

(Letter, January 11, 1943, Moody's to Schumacher; and letter, January 13, 1943, Curry to Moody's, were received in evidence and marked Defendants' Exhibit 5-C.)

(Testimony of Michael J. Curry.)

The Witness: Am I permitted to make some explanation of this letter?

Q. (By Mr. Adams): Do you wish to make some explanation? A. Yes.

Q. Go ahead.

A. It was not prepared by me, it was prepared by Miss Valouch.

Q. Which one are you now referring to?

A. I am referring to the reply to the Moody's Investment Service.

Q. Did you read it before you signed it?

A. I read it before I signed it.

Q. Did you understand it?

A. Miss Valouch was Mr. Schumacher's secretary, and she prepared it and then placed it before me and I signed it. [515]

Q. Mr. Curry, would you please look at the Moody's letter. A. Yes.

Q. What is Mr. Schumacher's endorsement on it? A. He just hands it over to me.

Q. Read it, please.

A. He turned it over to me and requests——

Q. Does it state anything? I mean, Mr. Schumacher's endorsement?

A. It doesn't say anything to me, it just questions——

Q. No, read it, whatever it is. I don't have it before me.

A. Well, in his blue pencil, "M.J.C.," with a question mark in blue, and under that, "M.C.V." in green, which was my pencil.

(Testimony of Michael J. Curry.)

Q. Your signature? A. Yes.

Q. Turning to Railroad's 440, which is the second letter in Defendants' 5-C, you have said that Miss Valouch prepared that letter for you?

A. Yes, sir.

Q. Did you read it before you signed it?

A. I did.

Q. Did you understand it?

A. Yes, generally; but as for the assembly of the figures, and so forth, you know, Federal tax matters or any tax matters were wholly Greek to me. I didn't understand them at all, and any time I got any question about taxes, it was always referred [516] to Miss Valouch or Mr. Polk.

Mr. Adams: I move to strike out the last statement as wholly volunteered.

Mr. Phleger: Well, no, I think that is responsive. He asked him whether he understood the letter.

The Witness: I am telling you why I didn't.

The Court: You asked him if he understood it. It calls for perhaps a Yes or No answer. It is not too far afield to allow the answer to stand. I will allow it to stand.

Q. (By Mr. Adams): Mr. Curry, would you please tell me what in your letter, this letter of January 13, 1943, you did not understand, aside from the computation of the particular figures in it?

A. I would say there wasn't hardly any of it

(Testimony of Michael J. Curry.)

that I understood, because it is all tax, "pre-tax net income and apportionment of tax," and I didn't understand just what those things were. I relied on our tax counsel and Miss Valouch.

Mr. Adams: Move to strike out the last portion. This question was, What in the letter was it that he didn't understand, and I would like to have his attention devoted to answering my question.

The Court: I will allow the answer to stand.

Mr. Adams: Very well.

Q. Now, Mr. Curry, again I ask you to point out to me the things in the letter that you didn't understand. Do I [517] understand you—Strike the question, first.

Do I understand that you say you didn't understand what apportionment of taxes meant?

A. Yes, I understand what apportionment means.

Q. Please state what it means.

A. It is division between the various companies.

Q. And did you understand that? A. Yes.

Q. The fact is you had understood that since 1927, isn't that true?

A. There are some things generally that I understood in Federal taxes.

Q. Would you answer my question, please. You understood what was meant by apportioning income taxes between members of the group since 1927, isn't that true? A. That is true.

Q. Now, what is in the letter, besides the figures, that you didn't understand?

(Testimony of Michael J. Curry.)

A. Well, the statements in there were, it says, "No provision has been made for accrual of excess profits tax, since it appears whatever excess profits net income there may be will be more than offset by the excess profits credit and the unused excess profits credit carryover."

Those are things that I just couldn't seem to understand in Federal tax matters. [518]

Q. Did you understand what was meant by "excess profits tax"? A. Generally, yes.

Q. Do you have any doubt about that?

A. No.

Q. Do you understand what is meant by "excess profits net income"?

A. I don't—I can't say that I did.

Q. What you mean by that, I take, is that you were not familiar with the precise provisions of the tax law which enter into the computation of excess profits net income, is that what you have in mind?

A. Yes, I believe that is what I have in mind.

Q. You did know, did you not, that there was an excess profits tax and that was levied against the net income as defined by the regulations?

A. I am a little confused. I didn't attempt to know the detail or to learn the detail of those things, because, as I say, Federal tax matters were Greek to me and I didn't attempt to study the regulations or know the regulations. As I stated, I depended on our tax counsel to see that the proper

(Testimony of Michael J. Curry.)

returns were filed and figures assembled, and so forth.

Mr. Adams: I take it, your Honor, that—I have made motions to strike, and there have been these explanations afforded by the witness. I don't want to take up your Honor's time by moving to strike these things each time they come along. [519]

The Court: Well, Mr. Adams, maybe I am as stupid about this as the witness is about tax matters, but I don't see where we are getting. If you tell me that you are attempting to show that this witness was fairly conversant with tax matters and thoroughly competent to make the decisions on taxes themselves, then of course the examination would be clearly pertinent.

Mr. Adams: Well, I have some such object in mind.

The Court: But if, as usually is the case, apparently that is what you are getting at here, you have got all kinds of tax lawyers in the case that tend to these matters; now, do you want to show that this witness was competent to make all these decisions himself, without the tax lawyers?

Mr. Adams: Oh, no, your Honor.

The Court: Well, what is it that you are trying to show?

Mr. Adams: What I want to show is that this witness knew more about taxes—he knew considerable about taxes, and I will go ahead with my proof. I don't want to take up too much time in details about a particular document.

(Testimony of Michael J. Curry.)

Mr. Phleger: I am not making objections as we go along, because I don't want anything pertinent not to be in the record, and I don't want to make myself objectionable by making objections. But our theory of this case is that it doesn't make any difference what this witness knew. It is utterly a false quantity in the case. There isn't anything this witness could [520] have done, either by himself affirmatively, by taking affirmative action or not taking action, that would destroy this plaintiff's claim in this case.

Mr. Clark: That is also the intervenor's theory.

Mr. Phleger: It is just utterly immaterial, but I am not objecting to all those things. I just think they are wholly and utterly immaterial.

Mr. Adams: Your Honor, I have only one purpose, and that is to confine myself to cross-examination within the limits of the original interrogation, and I will read to your Honor what was stated by counsel when he opened that examination. He said, "I want to establish the general nature of the functions of this witness in order that your Honor may have some general idea of his capacity and have the manner in which he conducted the various positions which he held."

The Court: I don't think that counsel was referring to capacity in the sense of ability.

Mr. Phleger: That's right.

The Court: But in a legal sense, what position he occupied and what authority he had. I have

(Testimony of Michael J. Curry.)

thought right along that there has been too much time spent on this. If you lawyers think there is something important in that which goes to the heart of the case, I don't want to stop you, but what difference does it make whether this man knew taxes, or how much he knew or how little he knew? It is not a question of his competency, it [521] is a question of his capacity in the legal sense, what position did he occupy, what were his functions. It is not whether he did them well or did them poorly or whether he knew more about taxes than he is willing to tell you now on the witness stand. What has that got to do with it?

Mr. Adams: I did not understand the statement about capacity in the way just stated by your Honor, and apparently neither did interveners' counsel, whose statement appears in the transcript, page 338, saying with reference to Mr. Curry: "As he is painted by Mr. Phleger's examination, he was simply a figurehead and knew nothing."

We understand we have to address ourselves to that on cross-examination. Now, I would further state—we are speaking of taxes themselves—that it was developed upon the direct examination that Mr. Curry signed the returns that were put before him. That was all. And it was developed that he had done that for a number of years. Now, those facts were developed, you heard argument now that it is immaterial. But the facts have been developed, and we think it is material, your Honor, to

(Testimony of Michael J. Curry.)

show that Mr. Curry had a considerable acquaintance with Federal taxes. That was done in response to the direct examination which opened up the question of his knowledge and experience in that field.

The Court: Well, I will hold now, so that it will save time for all concerned, that I give no weight to any testimony [522] heretofore introduced by the plaintiff or the intervener that goes to the question of the special competency of the witness or his ability to perform functions, but that I am only giving weight to such testimony as heretofore has been presented that goes to the legal position that the witness occupied and what his functions were as such. Therefore it is unnecessary for you to conduct a cross-examination to show how much or how little this witness knew or what his intellectual or other capacities or abilities were; because I will hold now that I am not giving any weight to that. So that it would therefore be redundant to offer any further testimony along that line. I didn't consider that the plaintiff's testimony was along that line, although it might have had that implication to you.

So in order to clear that up, I will make that ruling now so that the decks will be cleared of that matter. You needn't put any cross-examination in on it, because I am not going to give any weight to any part of the plaintiff's testimony that is concerned with that field. [523]

(Testimony of Michael J. Curry.)

The Court: I did not want to make that too narrow a distinction. In other words, there may be cases where the functions that were performed, and that were explored in the direct examination were of such a nature that it might be difficult to wholly separate the manner of doing from the function itself. But I merely wish to indicate that I did not see any point in just developing the theme as to the competence which functions were performed, because I felt that that was immaterial.

Mr. Adams: At this time I will proceed with a new subject.

Q. Mr. Curry, do you recall that in December, 1942, and January of 1945 there were estimates made of the 1942 income and excess profits tax liability?

A. I do not recall it definitely.

Q. Don't you recall, Mr. Curry, that there was correspondence between Mr. Schumacher and Mr. Elsey at or about that time with respect to estimates of the tax liability for the year 1942?

A. I have a recollection of that, yes, sir.

Q. I would like to show you Railroad's Exhibit 273, a telegram to DeGraff, dated March 2, 1943. Is that a copy of a telegram which you sent to Mr. DeGraff at or about that date?

A. Yes, sir.

Mr. Adams: I will now read this to the Court: "New York, March 2, 1943, D. C. DeGraff, Western Pacific Railroad Company, 526 Mission Street, San Francisco, California. Wire date.

"At the conference with accountants here yester-

(Testimony of Michael J. Curry.)

day decided file consolidated tax returns including subsidiaries you list. In view this we filed yesterday request for extension time to May 15. Am hopeful will be granted and will advise you promptly. Glad you are preparing necessary working schedules and tentative declared value excess profits tax returns and expect forward latter part this week. Our understanding regarding that consent not in accord with yours. See Paragraph I, Page 2, instructions for form 1120 which in our opinion requires such consent. This has been confirmed with the revenue agent here, [525] who states forms of consent have been printed and are available for 1942 returns. Procedure same as last year. Signed M. J. Curry."

I will offer the document as Defendant's 6.

Mr. Clark: If it please your Honor, may we also have the notations offered as a part of this exhibit, particularly the writing "M.C.V., o.k., M.J.C."

Mr. Adams: That is correct. That appears upon it.

Q. Mr. Curry, that is in your handwriting, is it not? A. It is.

Mr. Phleger: And also the notation that the telegram was charged to the Western Pacific Railroad Company.

Mr. Adams: The document is offered in its entirety. It carries also Mr. Curry's office stamp "M.J.C. March 3, 1943." Will you hand it to the Clerk so that it may be marked?

(Testimony of Michael J. Curry.)

(Telegram referred to was thereupon received in evidence and marked Defendant's Exhibit 6.)

Mr. Phleger: Your Honor, I do not like to interrupt, and perhaps it is wrong, but the telegram to which this is an answer is an important part of this series. For instance, it is addressed to Mr. Curry in his capacity as vice president of the Western Pacific Railroad Company, which I think is important. I do not like to break in, but if he introduces a wire which is an answer to another, it might save time if he would introduce the wire to which it is a reply. [526]

Mr. Clark: They were separate exhibits on the deposition, your Honor.

Mr. Adams: I have no objection, your Honor. It seems as if this were a one way street, however, and my purpose in offering this document hasn't anything to do with the fact just announced by counsel. Does your Honor feel that it is necessary for me to introduce papers requested by counsel?

The Court: I do not think so. It would be up to the other side to put in the other telegram. Sometimes we can facilitate matters if it will save time.

Q. (By Mr. Adams): Mr. Curry, referring to Defendant's Exhibit 6, your telegram to Mr. DeGraff of March 2, 1943, you see in the first line it reads "at conference with accountants here yes-

(Testimony of Michael J. Curry.)

terday decided file consolidated returns including subsidiaries you list." Do you note that?

A. I do.

Q. At the date that telegram was sent, Mr. Curry, March 2, 1943, it is the fact, is it not, that neither the firm of Whitman, Ransom, Coulson & Goetz nor Mr. Polk had been retained to do any tax work?

The Court: That is an established fact. This was about three weeks before that.

Mr. Adams: I am just directing the witness' attention to that.

Q. That is a fact, is it not? [527]

A. Well, they were employed early in 1943 but I can't recall just what date. But if this was before or after, it is my impression it was before they were appointed.

Q. Referring to the conference mentioned in the telegram of March 2, 1943, do you recall the conference which is referred to there?

A. I do not.

Q. You have no recollection of it whatever?

A. I have no recollection of it.

Q. Who were the accountants to which the telegram referred?

A. Lybrand, Ross Bros. & Montgomery, I believe.

Q. You knew that at the time? A. Yes.

Q. Now, it is the fact, is it not, that this conclusion to file a consolidated return was reached

(Testimony of Michael J. Curry.)

before the Whitman Ransom firm had been employed as tax counsel?

A. That is my recollection.

Mr. Phleger: Perhaps it will help if I make this statement:

Mr. Adams: May I ask that objections be stated in the ordinary style?

Mr. Phleger: I will object to further questions along this line. It is our theory that all of these occurrences which took place prior to March 15, when the economic unity was severed, that is, the decision of the United States Supreme Court which destroyed the economic unity, are irrelevant and immaterial. At the time that is just being testified to, the plaintiff corporation was the owner of all of the stock and there was outstanding a decision of the Circuit Court of Appeals which in effect said that it was going to have the equity or an interest in the equity of the reorganized road. The event which made the change had not yet taken place. Now, I did not make that objection, because I did not want to be in a position of making objections, but that is our position and I think all of this is not material, just as I think that all the evidence they are going to introduce of what happened back in 1917 with respect to consolidated returns is also not material. The thing that is material is what was done after the economic unity was severed on March 15, 1943.

Mr. Adams: Mr. Phleger, counsel in his opening examination asked these questions:

(Testimony of Michael J. Curry.)

“Q. Now, Mr. Curry, did you ever prepare a tax return? “A. No, sir.

“Q. For either the corporation or the company?

“A. No, sir.”

Later on:

“Q. Mr. Clark, this testimony is directed to what time?

“Mr. Phleger: I will do that.

“Q. What period of time are you referring to in the testimony you have just given?

“A. Up to the year 1942, as I recall.” [529]

And another question asked by counsel for the plaintiff, the witness' attention was directed to the returns for '42, '43 and '44, and he answered that to them. In each case he saw the returns, he answered, when Miss Valouch presented them to him. He inquired of her whether they were in satisfactory form and if Mr. Polk approved them, and then he signed them. My cross-examination is within the lines just opened.

The Court: Now what was the question?

Mr. Phleger: If I may say, I did not object to a question. I wanted to state my position with respect to this line of testimony, and there was no question before your Honor at the moment.

Mr. Clark: I think the subject of inquiry, was, your Honor, as to whether or not Whitman, Ransom, Coulson & Goetz were tax counsel at the time this telegram was sent.

Mr. Adams: I have the question, your Honor.

(Testimony of Michael J. Curry.)

The Court: All right.

Mr. Adams: The question is this:

Q. As a matter of fact, Mr. Curry, this conclusion to file a consolidated tax return for the year 1942 was reached, was it not, before Whitman, Ransom, Coulson and Goetz firm had been employed as tax counsel?

The Court: You mean the decision that is referred to in this telegram, Defendant's Exhibit 6?

Mr. Adams: Yes, your Honor. [530]

The Court: Written on March 3, was it?

Mr. Adams: March 2.

The Witness: March 2.

The Court: Well, that is obvious. The answer is "yes." I will answer for the witness.

The Witness: That is right.

The Court: Of course it was before. It was on March 2 and the Coulson firm wasn't employed until the 25th.

Mr. Adams: March 23 is the date of the letter which initiated the suggestion of employing that firm. I think the record accurately shows that.

Q. Now, Mr. Curry, did you, pursuant to the decision that was made at this conference, file a tentative consolidated return on or about March 15, 1943? A. It is my recollection we did.

Q. And that tentative consolidated return was the return of the parent company?

A. Yes, sir.

Q. And included the subsidiaries? A. Yes.

(Testimony of Michael J. Curry.)

Q. Including the Western Pacific Railroad Company, is that right? A. Yes, sir.

Q. Did anyone tell you to sign that return?

A. Tell me to sign it? [531]

Q. Yes.

A. I don't know that I understand just exactly what is meant by telling me to. It was placed before me and I asked if it was all right, and if it had Mr. Polk's o.k., and when I was told "Yes," then I signed it.

Q. And you bear in mind that you are now speaking of the tentative return that was filed March 15, 1943? A. Yes, sir.

Q. And is it your testimony that you were told that return had Mr. Polk's approval?

A. Yes, all returns that were placed before me had his approval. I always inquired of that.

Q. How about the return for the year 1941? Did that one have Mr. Polk's approval?

A. No.

Q. Now bearing in mind we are speaking of the tentative return of March 15, 1943, did that one have Mr. Polk's approval? Was that your understanding?

A. No, that was before the time they were employed.

Q. Now then, my question was, relating to that tentative consolidated return, did anyone tell you to file that return—strike that—to sign that return?

A. Well, Miss Valouch informed me of the de-

(Testimony of Michael J. Curry.)

cision, and I signed the tentative return.

Mr. Adams: May I have an answer to my question, your Honor, [532] whether anyone told him to sign the return?

The Court: Well, what was the witness' answer?

(Answer read by the reporter.)

The Court: Well, it is in part an answer.

Mr. Adams: Could I have yes or no along with the explanation, please?

The Court: Can you answer that yes or no? Did someone tell you to sign the returns?

The Witness: Yes.

Q. (By Mr. Adams): Who told you to sign the returns? A. Miss Valouch.

Q. Did you customarily receive instructions from her?

A. I customarily didn't receive instructions, but I relied on her in the tax matters.

Q. Isn't it the fact, Mr. Curry, that she was working on those income tax returns under your supervision and direction?

A. Yes, that is true.

Q. You were her boss in regard to those matters? A. That's right.

Q. No one else told you to file the returns?

A. No.

Q. Now the tentative consolidated returns show an estimated tax, did it not, of \$4,209,948, and in that connection I will refer to Railroad Defendant's Exhibit 282, as introduced on the taking of the depositions, being a letter or copy of a [533]

(Testimony of Michael J. Curry.)

letter, addressed by Mr. M. J. Curry, Treasurer, to the Collector of Internal Revenue, Second District of New York, Customs House, New York, of March 15, 1943, and ask that the Clerk hand this document to the witness.

(Document handed to witness by the Clerk.)

A. Yes, sir.

Q. And it is a fact, then, that the tentative return showed an estimated tax in that amount?

A. Yes.

Mr. Adams: May I offer the document as Defendant's Exhibit 7?

The Clerk: Exhibit 7.

(The letter of March 15, 1943, Curry to Collector of Internal Revenue, was thereupon received in evidence and marked Defendant's Exhibit 7.)

Q. (By Mr. Adams): Was a quarter of this estimated tax paid when the return was filed?

A. Yes, sir.

Q. Where were the funds obtained to make that payment? A. From the railroad company.

Q. That is to say, from the railroad company then being administered by the trustees?

A. Trustees, that's right.

The Court: Did the holding company have any income at that time? [534]

Mr. Adams: No, your Honor, the holding company had a loss which was entered in that return and which operated as consolidated returns always

(Testimony of Michael J. Curry.)

operate, as one of the deductions.

The Court: Yes, I understand that. Did this loss of the holding company, in connection with the other stock—was that in connection with the other stock it held?

Mr. Adams: No, your Honor, it had no relation to the stock loss. The amount was, as I remember, approximately \$350,000 and it was a current operating loss. I cannot give your Honor the details of that.

The Court: The expenses exceeded the income?

Mr. Adams: Yes, the expenses and more than the expenses—the current interest on the indebtedness of the plaintiff corporation was a part of that net loss.

The Court: I see.

Mr. Clark: It was accrued interest on the debts of the corporation that are subject of that November 22 agreement, later.

Mr. Phleger: The loss didn't come in, your Honor, till the claim for refund was filed in 1945, March 9.

Mr. Clark: That is the stock loss.

Mr. Phleger: The stock loss, I am referring to.

The Court: Yes. But we are talking now about——

Mr. Phleger: The other loss?

The Court: The other loss. That was what prompted my [535] inquiry, what was this loss upon which the tax of \$4,000,000, or some odd dollars, was calculated.

(Testimony of Michael J. Curry.)

Mr. Clark: It was chiefly accrued interest on these loans.

The Court: That is the loss of the holding company, aside from the loss of the stock.

Mr. Clark: Yes, your Honor.

The Court: In the operating. All right, go ahead, Mr. Adams.

Q. (By Mr. Adams): Was the balance of the 1943 tax also paid with funds obtained from the reorganization trustees? A. Yes, sir.

Q. Now I would like to direct your attention to Plaintiff's Exhibit 39A, a letter from Mr. Schumacher to Mr. Nicodemus, dated March 23, 1943.

(Document handed to witness by the Clerk.)

Q. (By Mr. Adams): Now, Mr. Curry, directing your attention to Plaintiff's Exhibit 39A, being an original letter from Mr. Schumacher to Mr. Nicodemus, March 23, 1943, I call your attention to the first paragraph (reading):

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942."

Do you recall that talk?

A. I don't recall it. [536]

Q. You have no recollection of it?

A. I have not at the present time.

Q. When you say you have not at the present time, Mr. Curry, do you have any qualification in your mind?

(Testimony of Michael J. Curry.)

A. No, I have no recollection of the talk.

Q. Now do you have any recollection of discussing the subject matter of this letter, Plaintiff's 39A, with Mr. Schumacher?

A. I don't recall it.

Q. You have no recollection of it?

A. I have no recollection of it.

Q. Do you recall that in April, 1943, the firm of Whitman, Ransom, Coulson & Goetz was employed by the trustees to act as tax counsel?

A. Yes, sir.

Q. And do you know who originally recommended the employment of that firm as tax counsel?

A. I don't know who originated it.

Q. And you have no recollection of discussing that subject with Mr. Schumacher?

A. No, it is my recollection that he and Mr. Nicodemus discussed the matter.

Q. What is your recollection about that?

A. Well, my recollection is that Mr. Nicodemus and Mr. Schumacher talked over the matter of employing tax experts to handle our tax matters. [537]

Q. Did you participate—strike that. Were you present during any such discussion between Mr. Schumacher and Mr. Nicodemus?

A. No, not as I recollect.

Q. And when you speak of recollection about it, do you have in mind that either Mr. Schumacher or Mr. Nicodemus told you about that?

A. That's right.

(Testimony of Michael J. Curry.)

Q. And do you have a recollection as to which one told you? A. Mr. Schumacher told me.

Q. Now I hand you a copy of a telegram, Railroad Defendant's 293, dated May 7, 1943, addressed by you to Mr. DeGraff, charged to the account of the Western Pacific Railroad Company, and I will read the first sentence of this telegram (reading):

"Reference question income and excess profits tax returns 1942 colon tax lawyers have decided we should file consolidated returns, which will do on or before May 15."

Mr. Adams: Will you hand this to the witness, please?

(Document handed to witness by the Clerk.)

Q. (By Mr. Adams): Up in the upper left corner, the initial in green "M.C.V."; did you write that on the document? A. Yes.

Mr. Phleger: That is Miss Valouch?

Q. (By Mr. Adams): That is Miss Valouch?

A. That's right.

Q. And did you have in mind, in putting her initials on the document, to make sure that she saw it after it had been sent?

A. No, my recollection is that the copy was on my desk, and I read it and then marked it back to her for the tax files.

Q. The fact is, is it not, Mr. Curry, that no telegrams were sent out over your signature until you had seen them? A. That is correct.

(Testimony of Michael J. Curry.)

Q. Now you notice that portion which I read in the second line, beginning the second line, "Tax lawyers have decided we should file consolidated returns, which will do on or before March 15."

Do you recall the basis on which you made that statement, the information you had?

A. The information received from Miss Valouch, who received this telegram—that is, who wrote this telegram and placed it before me.

Q. Is your recollection clear that she prepared it? A. Yes, sir.

Q. Who were the tax lawyers to whom you refer?

A. Whitman, Ransom, Coulson & Goetz.

Q. Had you, prior to that time, received any advice from them with regard to the taxes for 1942? A. No.

Q. You have no recollection of any discussion with Mr. Polk prior to that date? [539]

A. I have no recollection of any discussion with Mr. Polk at that time.

Mr. Adams: I will offer the telegram as Defendant's Exhibit 8.

The Clerk: Exhibit 8.

(Telegram dated May 7, 1943, referred to above, was received in evidence and marked Defendant's Exhibit 8.)

Q. (By Mr. Adams): Where were the consolidated returns for 1942 prepared, Mr. Curry?

(Testimony of Michael J. Curry.)

A. At the 37 Wall Street office.

Q. And was data obtained from San Francisco, from the general auditors there, in connection with the preparation of the returns? A. Yes, sir.

Q. From whom did you obtain that data?

A. From Mr. DeGraff, the general auditor.

Q. Who did the actual work of preparing the return? A. Miss Valouch.

Q. And did Mr. Reilly also work on the preparation of the return?

A. Yes, Mr. Reilly did.

Q. And he worked in the New York office upon that? A. Yes, we provided a desk for him.

Q. Had Miss Valouch, in prior years, worked on the preparation of tax returns?

A. Yes, sir. [540]

Q. Did you consider that she was competent to do that work? A. I did.

Q. And when she was working on the returns, is it the fact that she was working under your supervision? A. Yes.

Q. You were treasurer of the parent corporation; is it the fact, is it not, that for many years you had under your charge the preparation and filing of the income tax returns? A. Yes, sir.

Q. When we speak of Mr. Reilly we are speaking of the accountant who was engaged after Mr. Polk and the firm of Whitman, Ransom, Coulson & Goetz were engaged as counsel? A. That is correct.

Q. Do you know whether or not Mr. Polk him-

(Testimony of Michael J. Curry.)

self took any part in the actual preparation of the returns? A. I do not.

Q. Who signed the 1942 tax returns?

A. I did.

Q. Who brought them to you for signature?

A. Miss Valouch.

Q. Do you recall any discussion with her at the time you signed the returns?

A. I do not recall any particular discussion. I just asked her if they were in proper shape for my signature, and she said, "Yes," and had Mr. Polk's approval, and so I signed them.

Q. Do you recall testifying upon the taking of your deposition as to the discussions which took place with respect to your signature upon the returns?

A. I recall the statement I made at that time.

Q. The reference I have refers to the following year, so I won't take it up at this time.

Do you recall noting the amount of tax due at the time you signed the 1942 returns?

A. Yes, sir. [542]

Q. Did you note that it was approximately the amount of the taxes shown upon the tentative returns that had been filed in the preceding March?

A. Yes, it was my practice to note those figures on the original of the return.

Q. Did you express satisfaction that these final returns indicated that the work done on the tentative returns had been rightly done?

(Testimony of Michael J. Curry.)

A. I do not recall what my reaction was.

Q. Do you have any recollection of that one way or the other? A. I have not.

Q. Do you have any recollection of expressing satisfaction of that sort at any time in reference to the 1942 returns?

A. I have no such recollection.

Q. Do you recall the occasion on or about May 18, 1943, when you met with Mr. Polk and Mr. Nicodemus and others in Mr. Nicodemus' office to discuss the 1942 returns? A. I recall the conference.

Q. Do you have any recollection whether or not at that time you expressed satisfaction that the work done on the tentative returns before Mr. Polk was engaged had been well done, as was indicated by the work done after he was engaged?

A. I have no such recollection.

Q. Would you say you did not express that satisfaction? A. No, I have not. [543]

Q. You have no recollection about it one way or the other? A. I have not.

Q. Have you any recollection about feeling satisfied about the tentative returns coming out the way the final returns did? A. No, I have not.

Q. Did Mr. Polk at any time tell you to sign the 1942 returns? A. No.

Q. Was he present when the returns were signed? A. No.

Q. Did you consider that you were signing the returns in the ordinary course of business?

(Testimony of Michael J. Curry.)

A. Yes.

Q. Do you now have any objection to the manner in which the returns for 1942 were prepared?

Mr. Phleger: If your Honor please, I submit that this is obviously not a proper question. It is not within the scope of the direct examination and hasn't any application to any issue in the case. What the witness believes about it now, it seems to me, is utterly and wholly incompetent, and immaterial.

Mr. Clark: We object to it upon the ground it is incompetent, irrelevant and immaterial. [544]

* * *

The Court: I do not quite see the point of that question. I will sustain the objection.

Mr. Adams: I will ask the next question, which will [545] doubtless meet the same ruling, but for the purpose of the record has anyone occupying any position with the plaintiff corporation, to your knowledge, ever criticized the returns?

Mr. Phleger: I object to that also on the ground it is irrelevant, incompetent and immaterial.

Mr. Adams: I understand the ruling to be the same.

The Court: You say, has anyone ever criticized the returns. Now, that is a pretty broad question.

Mr. Clark: We will add to the objection that it is vague, indefinite and unintelligible.

The Court: Isn't that one of the ultimate questions the Court has to decide?

(Testimony of Michael J. Curry.)

Mr. Adams: What I am seeking to get is a statement which I think we can establish better in some other fashion, if your Honor thinks these questions are objectionable. But no one has ever criticized, and there is no criticism in this case of the returns that were filed. The only question in the case is brought forth by our adversaries predicated on the fact that the returns filed were well filed, that all the work done in that regard was well done, and the claim here is to a share in the accomplishment, treating the matter as an accomplishment and getting the tax liability settled with the Federal Government. But I take it there is no criticism, can be no criticism, of the returns as filed, and, on the contrary, plaintiff's own case and the interveners' own case is [546] predicated upon the returns as filed.

The Court: You mean as to the amount involved?

Mr. Adams: As to all the work done in filing the returns. I take it it is conceded that had it not been for the fact that consolidated returns had been filed, these gentlemen would not be in court with a claim.

The Court: Of course not; that is obvious.

M. Adams: And the returns themselves as filed are not criticized in any respect or in any particular, in view of our adversaries' contention, as I understand it, that everything done in that connection was well done.

(Testimony of Michael J. Curry.)

The Court: You are trying to get the witness to say that it was a perfectly lawful thing to have filed the returns in the way they were filed, and that by doing so the plaintiff thereby debarred itself from prosecuting this suit? That is a question I have to decide.

Mr. Adams: Your Honor, I am not seeking an argument that bars the plaintiff from filing the suit. I want to establish a fact in the case, which is, as I understand it, that there is no criticism of these returns whatever.

The Court: You mean that as filed the returns were correct?

Mr. Adams: And the job was well done. There is no criticism of anything that was done in the way of filing the returns and the making of the settlement.

The Court: You mean the skill with which the returns [547] were prepared and filed?

Mr. Adams: I mean the accuracy, the compliance with regulations in all respect.

The Court: There is probably no dispute about that, is there?

Mr. Phleger: No, inasmuch as the net result was that there were no taxes for any of the years, I do not see how anybody could criticize the final result taxwise.

The Court: Then you are in agreement on that, if it is material.

Mr. Phleger: It is not material at all.

Mr. Adams: The taxes were paid, Mr. Phleger.

(Testimony of Michael J. Curry.)

There was \$4,200,000 paid for 1942, and then there was a stipulation that that should be treated straight across the board and try not to change it.

Mr. Phleger: Yes, and also a claim for refund for the entire amount also.

Mr. Adams: Which was disallowed in the course of the settlement.

Mr. Phleger: It was disallowed by your agreement or by the agreement of the parties.

Mr. Adams: By the stipulation entered into. The whole matter has been stated in the stipulation.

Mr. Phleger: That is right.

The Court: Let us get ahead. [548]

Q. (By Mr. Adams): When you filed the 1942 returns, Mr. Curry, you knew, did you not, that the plaintiff corporation on a separate return basis would have had no tax to pay?

A. The parent?

Q. Yes. A. I did, yes. [549]

* * *

Q. (By Mr. Adams): Mr. Curry, bearing in mind that you knew when you filed the 1942 returns that the corporation on a separate return basis would have had no tax to pay, did it occur to you at that time that this was any reason why the corporation should have filed a separate return?

A. It did not occur to me at that time.

Q. Who arranged for the filing of the 1942 consolidated returns?

A. Who arranged for the filing?

(Testimony of Michael J. Curry.)

Q. Yes.

A. On my instructions, they were filed.

Q. That is to say, it was done under your supervision and direction?

A. That is correct.

Q. As the officer in charge of that matter?

A. That is right.

Q. Where were they filed?

A. They were filed at the Customs House, Second District, in New York City.

Q. Who wrote the letter transmitting the returns to the collector at the Customs House?

A. It was the custom for Miss Valouch to write the letters and [551] place them before me for signing.

Q. Is that what happened in this case?

A. It is my recollection, yes.

Q. And you saw those letters at that time?

A. Yes, sir.

Q. And signed them yourself?

A. Yes, sir.

Q. Before you signed the 1942 returns you discussed them with Mr. Schumacher, did you not?

A. I have no recollection of discussing them with them. I might have informed them what the net result was, and so forth.

Mr. Adams: May that portion of the statement beginning, "I might have" go out?

The Court: Very well.

Mr. Adams: I will ask that the deposition of Mr. Curry be handed to him and direct his attention to page 2822, and particularly at page 2823.

(Testimony of Michael J. Curry.)

Q. Do you have that before you, Mr. Curry?

A. I have that before me.

Q. Directing your attention to page 2822, the third, fourth, fifth and sixth lines, being a portion of a letter identified in the deposition as Interveners' Exhibit 6, and which I believe is Plaintiff's 39A——

Mr. Clark: That is correct, Plaintiff's trial exhibit 39A.

Q. (By Mr. Adams): Do you notice the statement, "Mr. Curry has [552] told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942"?

A. Yes, sir.

Q. Does that refresh your recollection that you did discuss that subject with Mr. Schumacher before the returns were filed? A. Yes, it does.

Q. Do you have any recollection of what the subject of that discussion was?

A. No, sir, I have not.

Mr. Phleger: May the record show you are referring now, Mr. Adams, to the tentative return?

Mr. Clark: Filed on March 15, referred to in the letter of March 23, whereas your other interrogation was directed toward the time of filing, which was May 15, months later.

Mr. Phleger: The letter you are quoting from shows that right on its face, "with reference to the tentative tax return."

Mr. Adams: I will read the whole letter:

(Testimony of Michael J. Curry.)

“Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942. The return filed was a tentative one, an extension having been granted until May 15, 1943, to file a final return. As one of the trustees of the Western Pacific Railroad Company, I am looking to you [553] to co-operate with Mr. Matthew, general counsel for the trustees, in protecting the trust estate in the preparation of the final returns,”

this being a letter dated March 23, 1943, addressed by Mr. Schumacher to Mr. Nicodemus.

Q. Did Mr. Schumacher offer any objection to the filing of consolidated returns for the year 1942?

A. No, sir.

Q. Do you remember that on May 18, 1943, a conference was held at the office of Mr. Nicodemus at which you, Mr. Polk and Mr. Nicodemus and Miss Valouch and Mr. Reilly were present?

A. Yes.

Q. What was discussed at that conference, according to your best recollection?

A. Well, it was tax matters, but as I recall it was mostly on the question of depreciation.

Q. What was discussed on the subject of depreciation?

A. I was a listener, I did not take part in the discussion at all.

Mr. Adams: Would you read the question?

(Question read.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Adams): Your answer, Mr. Curry, referred to what you did; my question was, if you will please tell me, what the discussion was so far as you recall it?

A. I don't remember.

Q. Have you any recollection of it at all? [554]

A. I have not.

Q. What other tax matters besides depreciation do you recall were discussed at that conference?

A. I have no recollection.

Q. You have no recollection of any of them?

A. No.

Q. Do you have any recollection that there was discussed at that conference the consolidated returns for the year 1942 which had been filed three days prior to that time?

A. I do not recall that that was discussed.

Q. You have no recollection about it one way or the other?

A. I have no recollection about it.

Q. Do you have any recollection that there was discussed at that conference anything relating to the advantages of filing the consolidated return instead of separate returns for 1942?

A. No, I have no recollection.

Q. No recollection about that at all?

A. No.

Q. Do you have any recollection of knowing at or about that time that there were substantial advantages in the filing of consolidated instead of separate returns covering the year 1942?

(Testimony of Michael J. Curry.)

A. Generally I understood there were advantages, yes, sir.

Q. Did you understand that they were substantial in the way of tax monies? A. Yes, I did.

Q. Do you have any recollection at that conference—I asked you this before but I will again—whether or not you expressed satisfaction that tentative returns filed under your supervision before Mr. Polk was engaged turned out, according to his word, to have been well done?

A. I have no such recollection.

* * *

Tuesday, February 8, 1949—2:00 P.M.

* * *

Q. (By Mr. Adams): Mr. Curry, continuously from the year 1927, is it the fact that you had in charge, and it was your responsibility, the filing of the income tax returns for the Western Pacific group? A. It was.

Q. Was it the practice of the group to file consolidated or separate returns?

Mr. Phleger: Now, may it please the Court, I don't want to, because I am not objecting to this, waive any objection. In fact, I will interpose an objection to the point that the practice prior to the critical day of March 15, 1943, with respect to the filing of tax returns, is irrelevant, incompetent and immaterial. All during that period they were in the relationship of parent and subsidiary, and after this date they were strangers.

(Testimony of Michael J. Curry.)

The Court: Well, of course, that really goes to the effect of the testimony, doesn't it, Mr. Phleger? The fact is not disputed, is it?

Mr. Phleger: Not whatever. I would so stipulate. I consider it, however, absolutely immaterial.

The Court: You are simply reserving your right to argue [557] the effect of that, if it is not material; then it wouldn't have any effect in that case.

Mr. Phleger: That's right. But I don't want to see the record encumbered with immaterial evidence.

The Court: Well, you have preserved the record so far as your claim is concerned.

Mr. Clark: Well, may it please your Honor, so far as the fact is concerned, it is true that all through this period consolidated returns were filed. But that doesn't necessarily connote an automatic practice. There is certain evidence which could be produced before your Honor to the effect that at least in 1941, with respect to excess profits taxes, they sat down and considered whether a separate or consolidated return would be more advantageous for the group. And if we are going to get into that as being an automatic practice followed, then even in addition to Mr. Phleger's point—which we concur in, that it is immaterial, directed to any time before——

The Court: Well, the witness wasn't asked about an automatic practice, he was asked whether or not from 1927 on consolidated returns were filed.

Mr. Clark: I thought the question involved the word "practice", your Honor.

(Testimony of Michael J. Curry.)

The Court: Well, it may be. Would you read that?

(Question read by the reporter.)

The Court: I will sustain the objection on the ground of [558] "practice" but if you wish to bring out the facts, if in fact consolidated returns were filed,——

Mr. Clark: That is the fact.

The Court: Then that is stipulated to, is it?

Mr. Clark: Yes, so far as we are concerned.

Mr. Phleger: And so far as we are concerned.

* * *

The Court: It has been already agreed that consolidated returns were filed from that time on, while the witness was connected with the companies. Now if you want to ask some more questions following that, go right ahead. [560]

* * *

Q. (By Mr. Adams): What was done about filing the returns, Mr. Curry, from 1927 forward, as far as you know, in the way of consolidated or separate returns?

A. Consolidated returns were filed during that period.

Q. And you knew that at that time, that the returns were filed? A. I did, yes. [561]

Q. What is the difference between a consolidated and a separate return?

A. A consolidated return takes into account the net results of the affiliated companies and a separate

(Testimony of Michael J. Curry.)

return would not consider those things at all. The corporation would file its own return.

Q. Where were the consolidated returns customarily prepared?

A. In the office at 37 Wall Street, New York.

Q. Was it customary to file them without their being sent back to the San Francisco office for checking?

A. I think the final work was done in the New York office and a copy of the return sent to San Francisco.

Q. After it had been filed?

A. After it had been filed, yes, sir.

Q. Was data obtained from San Francisco in connection with the preparation of the returns in the New York office?

A. Data were, yes, sir.

Q. Who conducted the correspondence with the San Francisco office on the subject?

A. It was conducted over my name invariably. I think sometimes Mr. Schumacher asked for information of Mr. Elsey.

Q. Aside from the occasions when Mr. Schumacher asked Mr. Elsey for information, it is a fact, is it not, that every letter that was sent to the San Francisco office with respect to taxes was a letter which you sent? [562]

A. Yes, sir.

Q. And every telegram was a telegram sent under your name?

A. Yes, sir.

Q. And you read the telegram before it was sent?

A. Yes, sir.

(Testimony of Michael J. Curry.)

Q. And every bit of correspondence coming to the New York office, other than such as Mr. Elsey might write Mr. Schumacher in regard to income tax, was correspondence addressed to you?

A. Correct.

Q. Was that for the reason that you were in charge and responsible during all those years for the tax returns for the group?

Mr. Phleger: May I interrupt here to ask counsel to fix the time? Are you referring to right up to date or are you referring up to the filing of the 1942 returns or the 1943 returns? The testimony by this witness has been very clear and especially to the contrary with respect to these later years.

Q. (By Mr. Adams): Mr. Curry, you may answer the question and make a distinction as to time, if you have any.

A. May I have the question, please?

(Question read.)

A. Yes, sir.

Mr. Clark: May it please your Honor, we still haven't the time fixed. Does this relate to the period prior to March 15?

Mr. Adams: Let us ask the witness.

Q. What period of time did you have in mind, Mr. Curry, when [563] you answered the last question? A. The entire period from 1927 on.

Q. And when you say "on" you mean until the closing of the New York office? A. Yes, sir.

(Testimony of Michael J. Curry.)

Q. Who did the actual work of preparing the returns in the New York office?

A. Miss Valouch did, in collaboration with certified public accountants.

Q. There was a time, was there not, a considerable period of time, before Miss Valouch worked at this? A. Yes.

Q. Prior to the time when she worked at it was there a Mr. Andrews in the office who worked at it?

A. That is right.

Q. And he was an accountant in that office under your direction and supervision?

A. That is correct.

Q. So during the years when he was doing that work, he was doing it under your direction and supervision? A. Yes, sir.

Q. And thereafter when Miss Valouch came on, she similarly worked in the same fashion?

A. That is right.

Q. Were the returns to your knowledge ever submitted to the [564] board of directors of the parent corporation before they were filed?

A. No.

Q. The fact is, is it not, that the returns were filed without being taken up with the board of directors? A. Yes.

Q. Who signed the returns for the years 1927 to 1941?

A. They were signed by me as treasurer of the

(Testimony of Michael J. Curry.)

corporation, and I believe by Mr. Schumacher as president of the corporation in the early years.

Q. What was the customary method of allocating the tax among the members of the group that was due under the consolidated returns?

Mr. Phleger: I am going to object to that. He uses the word "practice" again. The facts speak for themselves with respect to the returns, and I think it is utterly immaterial what the practice was or what was in fact done prior to this date.

The Court: I am inclined to agree with that. Do you think anything could be gained by discussing that matter? What difference would it make what the practice was? I know that in the opening argument you and Mr. MacKinnon also argued that there was a relationship here that existed throughout the years, and that that has a bearing upon the issues here. Do we need a lot of evidence on that? [565]

* * *

Mr. Adams: The simple things are all you need to know. The idea that the plaintiff corporation has a claim is not a tax expert's idea at all. It hasn't any source in taxes. Part of our case is the tax loss is not involved at all. This claim is an afterthought that occurred years later, and yet the only facts that you needed to know to have that thought were the [569] very facts that were published and known to everybody who participated in the transaction.

(Testimony of Michael J. Curry.)

The Court: But that is not the claim of your opponents. The issues which they raise are that they did not get a chance to do that, that is all. They may have known about it.

Mr. Adams: This witness is one of our adversaries, the president of the plaintiff corporation.

The Court: Did you have any stock in any of these companies?

A. I did not.

Q. And did you represent any group of stockholders whose interest you were particularly concerned with? A. No, your Honor.

Q. Now, how about Mr. Schumacher? Was he a stockholder?

A. I don't know as to that. I don't think so. I might qualify my previous statement; the only stock I had in the corporation were qualifying shares.

Q. Now did Schumacher represent any particular group of stockholders in any of these companies?

A. Not to my knowledge, your Honor. [570]

* * *

Mr. Phleger: May I make a very brief statement? We conceive it utterly immaterial what this witness or any other witness may have known about the tax incidents of these returns, because we do not believe people lose rights because they know something.

We further submit that neither this witness nor any other witness knew the legal or economic consequences of the matters just mentioned; namely, the

(Testimony of Michael J. Curry.)

consolidated return and the utilization of the loss—knowledge that a consolidated returns is filed or that a loss is used in it is entirely different than a realization of what rights, if any, that may give rise to.

But finally, we press this point again. Counsel seems to assume that this witness is the president of the plaintiff [571] corporation. But during all of this time he was also the vice-president, assistant treasurer, and assistant secretary of the defendant corporation. And how what he knew could in any way bind the plaintiff in this litigation or its stockholders is beyond me.

The Court: Well, I am inclined to believe knowledge hasn't got anything to do with this case.

Mr. Adams: Well, if that is so, your Honor, how does it happen that the plaintiff on the examination of this witness took up the very question of his knowledge? Because this is directed to the inquiry opened by the plaintiff. Let me read to your Honor some of the examination by the plaintiff in this case, in which it is said first:

“I want to establish the manner in which the witness conducted the various positions which he held.”

Then the Court asked:

“What you are trying to show is that the president was just a presiding officer and a sort of figurehead?”

And counsel said:

That is correct.”

And then, when it came to tax matters, your Honor, on his own examination counsel said: (reading):

(Testimony of Michael J. Curry.)

“Q. Did you ever prepare a tax return?”

That is over this whole period of years. Now counsel opened that up. And then I asked the witness, and the witness uses [572] this ambiguous expression: “Taxes are Greek to me.” And that is on the record.

Now I think within the fair scope of cross-examination, I should be entitled to show the facts which were opened by opposing counsel, and with respect to which my present inquiry is now related.

The Court: Well, of course, I think that whether it was opened by plaintiff or not is really immaterial in this case. It wouldn't make any difference how much or how little knowledge. Knowledge would neither create nor defeat the cause of action here.

Mr. Adams: Well, your Honor, as our opponents have said,—

The Court: If they had a cause of action and it existed and they did not assert it and thereby lost their right to assert a cause of action because of something that happened, then they lost it. It wouldn't make any difference whether they knew about it or not, would it?

Mr. MacKinnon: Yes, definitely.

The Court: It would?

Mr. MacKinnon: Certainly it would. If this man knew of his rights and failed to assert his rights,—not this man, but this corporation—after all is said and done, irrespective of what else you say, he was the president of the corporation. The

(Testimony of Michael J. Curry.)

corporation was responsible for making him its president, and what this witness knows is imputable to the corporation. [573] His knowledge and the knowledge of the corporation is of very substantial moment on the basis of the bankruptcy bar, to say only one thing; also on the basis of whether or not they have the right and lost it.

The Court: Well, I never heard of that doctrine before. You mean that a person either has or hasn't a right, depending upon whether he knows he has one or not?

Mr. MacKinnon: I didn't say that, your Honor. I said at the inception of my argument in this case that you had what I conceive to be a basic legal question. That basic legal question is untrammelled by the color that has been injected into the case. I said there was a second step, and the second step is whether or not their failure to act when they should have acted precludes them from acting today. That is before you get down to duality, domination.

The Court: That is a different matter, Mr. MacKinnon, from knowledge. Yes, if a person has a cause of action and fails to take a step which he should have taken, he may lose his cause of action. But his knowledge hasn't got anything to do with it unless there has been some overreaching on someone else's part that has caused him, or prevented him, from doing it. But whether he knows that he has a cause of action or not, whether you know or

(Testimony of Michael J. Curry.)

you don't know that you have got a cause of action, if the Statute of Limitations runs, for example, you are finished.

Mr. MacKinnon: That is right. [574]

The Court: And I don't think it makes any difference in this case, either, whether there was any knowledge or not. What difference does that make? It is a question of whether or not there was a failure to assert in the proper forum a claim if one existed.

Mr. MacKinnon: That is right.

The Court: And if there was a failure to do it, if it is excusable on equitable or legal grounds, that is recognized.

Mr. MacKinnon: That is right. I will go along on that.

The Court: So knowledge hasn't got anything to do with it. I don't think it makes any difference who knew what and how much each man knew.

Mr. MacKinnon: I think it is a matter of considerable moment what knowledge a person possesses, because in evaluating the conduct or lack of conduct on the part of a person, his knowledge and his competency is a matter of considerable moment.

The Court: Well, let's assume he had very full knowledge of the matter. Now wouldn't that be just as much to your disadvantage as to your advantage?

Mr. MacKinnon: I don't think so, your Honor.

Mr. Levy: That is why the interveners are in

(Testimony of Michael J. Curry.)

the middle, your Honor; the stockholders sitting here are not chargeable with this man's knowledge, any more than the railroad company who held him as their vice-president.

Now if he knew everything that was involved in this matter, [575] couldn't Mr. MacKinnon say he knew it as president but didn't know it as vice-president, or that he didn't use his knowledge for the advantage of one rather than the other?

The Court: Well, I think I am still of the view that that knowledge is purely an immaterial issue here. But I think each side should be permitted to make whatever record you want within reasonable limit, so that it doesn't take too long, and so that it cannot be said that there wasn't proper opportunity to make the necessary record of what you want to present.

Mr. MacKinnon: May I just make one remark, your Honor, and then I will sit down, because I don't see any sense in prolonging this discussion. This case, in my opinion, could have been made in a very different way if plaintiffs in stating what they now state that they had that as their objective. Now bear in mind, I told you as these documents were going in, that they wanted coloring. They put in coloring. They have attempted to develop the fact that this man was a thorough incompetent. They have done that. Now then, can the defendants do other than meet that?

The Court: I don't think that is so, Mr. Mac-

(Testimony of Michael J. Curry.)

Kinnon. I didn't get any impression that there was any attempt to show he was an incompetent. It was developed that he was the kind of man that he was, and Mr. Schumacher took him over because he knew him, he had had experience, and he put him in charge of certain activities of this company. He had certain authority, [576] and certain authority he didn't have. I don't think there was any attempt to show inherently that the cause of action arose because of any lack of ability or competence on the part of this man; but that it arose just because of the fact that that was the position that he was occupying. I didn't get any such impression from the testimony.

Mr. MacKinnon: I am glad your Honor didn't because I believe it to be a concerted effort.

Now then, one more word, and let me say another thing——

The Court: Oh, I think this witness did nine or ten thousand dollars' worth of work for this company, without any question.

Mr. MacKinnon: I haven't any doubt about it.

The Court: Whatever he did, he didn't have to be a big shot to earn that much money, not according to some of the salaries we read about in the papers.

Mr. MacKinnon: Well, in railroad parlance, I think he had to be pretty big. But one thing more. We are not only meeting the plaintiff's case here, your Honor, we are meeting the interveners' case.

(Testimony of Michael J. Curry.)

The Court: Well,—

Mr. MacKinnon: Now, if your Honor says that the interveners cannot state their case, then obviously we could materially revamp our case. But we have got to meet whatever they present. [577]

The Court: Well, I think you should do that, and I am not going to prevent you in any way from doing it. The only trouble is, I think we are spending too much time on cross-examination of this particular witness when we should be getting to the issues of this case. We should be getting down to the point where you are going to present the matters upon which you have spent time in preparation, and as a part of your case. But there is too much being dragged into the cross-examination of this particular witness that is really out of place in cross-examination.

Mr. Adams: Your Honor, I don't think there is anything yet that I have asked that is not fairly within the scope of the direct examination.

The Court: Well, of course, if you want to stretch the rubber band far enough, I suppose you can ask anything under the guise that it is cross-examination.

Mr. Adams: I don't think I have asked anything, your Honor; I would say most seriously that the effort of which we have been conscious since the pre-trial on the part of the plaintiff to do what he calls "streamline the case", and bearing in mind the knowledge we have of this record, has been

(Testimony of Michael J. Curry.)

what appears to us an effort to substitute for the real facts an artificial picture.

The Court: Well, the witness was only asked in detail concerning the tax transactions in 1943, '44, and '45.

Mr. Adams: He was asked, your Honor, over the whole period. [578]

The Court: Oh, yes, he was asked some general question that was preliminary.

Mr. Adams: Right.

The Court: And then within the guise of the argument that you are entitled to cross-examine on that, you want to go back and take up year by year everything that was done in tax matters. I won't allow it in cross-examination because I just think it is too far afield to go into every year and every tax return that was filed in all the years before the critical period; merely because the witness on direct examination said that he didn't have very much knowledge of taxes, or that he signed the returns that were prepared for him in this particular matter, in this particular critical period, relying upon the advice of those who prepared them for him. Now just to go back over all the prior years and go into that seems to me to be too wide a latitude in cross-examination.

Mr. Adams: Your Honor will, I am sure, indulge me if I should make some offers and perhaps dispose of a matter that way, bearing in mind that some of these matters are material.

(Testimony of Michael J. Curry.)

The Court: Suppose you ask another question now so we can get the record in shape. What is it you have particularly in mind now?

Mr. Adams: The question was, What was the customary method of allocating the tax under the tax returns?

The Court: Now you are speaking of the years prior to 1943? [579]

Mr. Adams: I am speaking of the customary practice, the method that was pursued all the way through, including the year 1942.

Mr. Clark: Going back as far as 1927, your Honor, is that correct?

Mr. Adams: Prior to that, yes, that's right. That was when Mr. Curry's knowledge of the matter begins. That is correct. It begins in '27 and goes through '42.

The Court: Now was there an objection to that?

Mr. Phleger: There was an objection upon the ground it was not proper cross-examination and it was irrelevant, incompetent, and immaterial.

The Court: I will sustain the objection.

* * *

Q. (By Mr. Adams): Now, Mr. Curry, it is the fact, is it not, that during the very years in question here, that is, 1942, 1943 and 1944, also 1945, you personally examined tax data, tax clippings, matters related to taxes that came through your office? A. I personally saw it, yes.

Q. Yes, and checked it off? [580]

(Testimony of Michael J. Curry.)

A. And checked it off.

Q. And why did you do that?

A. For the simple reason that I wanted it to come to the attention of Miss Valouch and our tax counsel. I did not understand tax matters.

Mr. MacKinnon: I move to strike out that remark on the ground it is not responsive.

Mr. Clark: I think it is, your Honor.

The Court: He asked him why he did it. Now when you ask the witness why he does something, he can tell you everything and throw in the kitchen stove besides.

Mr. Adams: Very well.

Q. Was it because you didn't understand taxes that you underscored particular portions of those pieces of publicity?

A. That is right, that is quite right; because at times Miss Valouch would bring my attention to the matter of depreciation, and if I saw a clipping that mentioned depreciation, I would send it in to her. I might not have understood it myself.

Q. Now, Mr. Curry, turning to the 1942 returns, you recall we were discussing that before, at the noon hour? A. Yes, sir.

Q. Did Mr. Polk discuss with you the problem of changeover from retirement to depreciation accounting?

A. I have no recollection that he did.

Q. Do you recall we were speaking of the conference of May 18 in [581] Mr. Nicodemus' office?

(Testimony of Michael J. Curry.)

A. Yes, I had in mind qualifying that statement.

Q. Yes, go right ahead and do so.

A. I wanted to say that at this conference the matter of depreciation and retirement was discussed.

Q. Did Mr. Nicodemus participate in the discussion? A. He did.

Q. Did you? A. I did not.

Q. Did Mr. Polk discuss the reasons for filing consolidated returns? A. I don't recall.

Q. You have no recollection about that?

Mr. Phleger: I submit that that question has been asked and answered three times.

The Court: Yes, I think so.

Mr. Adams: This is cross-examination, your Honor.

The Court: Well, I know, but it still was asked and answered before on cross-examination.

Q. (By Mr. Adams): Did Mr. Nicodemus discuss at that meeting, to your recollection, anything having regard to the reasons?

Mr. Clark: Just a moment, the reasons for what, your Honor?

Mr. Adams: For filing consolidated returns. I had reference to the last preceding question. The answer was "no", as [582] far as you recall?

A. I don't recall that he did.

Q. (By Mr. Adams): Now do you have any recollection that it was agreed at the conference that Mr. Polk would write a letter setting forth

(Testimony of Michael J. Curry.)

the information that he had presented at the conference?

A. It is my recollection that he stated he would.

Q. And I would like you now to look at Plaintiff's 50, a letter of May 20, 1943, addressed to you by Mr. Polk, and I will also show you Interveners' Exhibit 29A, a letter dated May 21, 1943, and addressed by you to Mr. Nicodemus.

The Court: That is Interveners' Exhibit on deposition?

Mr. Adams: On the deposition, yes, your Honor. I will have it in a moment.

(Documents handed to the witness by the Clerk.)

Mr. Adams: Interveners' 29A, your Honor, is a letter of May 21, 1943, on the letterhead of the Western Pacific Railroad Company, 37 Wall Street, New York, from M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer, addressed to Mr. F. C. Nicodemus, 40 Wall Street, New York, New York:

"Dear Mr. Nicodemus:

"Enclosed is copy of Mr. Polk's letter of May 20, 1943, in re: tax matters. Very interesting! I suggest it might be well for you to drop over Monday morning, the 24th, and discuss with Mr. Schumacher, who will [583] leave that afternoon for San Francisco.

"Yours very truly,

M. J. CURRY."

(Testimony of Michael J. Curry.)

And there is attached to it, the letter which I have just read, Interveners' 29B, a copy of plaintiff's Exhibit 50, namely, Mr. Polk's letter to Mr. Curry of May 20, 1943.

Now there is also annexed to Interveners' 29B, Interveners' 30, but I take it that has no part in this.

Mr. Clark: Oh, I think not. No, that has no part of that portion of the exhibit, or the purpose for which it was put in. That copy of the letter, your Honor, is an identical copy to Plaintiff's trial Exhibit 50 already in evidence.

The Court: I understand that. But counsel is referring to something else, though?

Mr. Adams: Yes, with counsel's permission, I would like to remove Interveners' 30 which is annexed to this.

Mr. Clark: That is all right. Interveners' 30 doesn't bear on this particular situation.

Mr. Phleger: I would like to recall that on direct testimony, this fact that that letter was sent was testified to.

Mr. Adams: I don't understand that that is any objection to cross-examination.

Mr. Phleger: Well, I don't know. We think it is. It is already in evidence.

(Document handed to witness.) [584]

The Court: It does make the record a little bigger.

Mr. Adams: Very well. I haven't asked any

(Testimony of Michael J. Curry.)

question about it, I have just handed it up to the witness, your Honor.

The Court: You are not offering it in evidence?

Mr. Adams: No, I am about to offer Interveners' 29A, the letter of May 21, 1943, which I have just read to your Honor, as Defendant's Exhibit 9.

The Clerk: Exhibit 9.

(Letter dated May 21, 1943, referred to above, was received in evidence and marked Defendant's Exhibit No. 9.)

Q. (By Mr. Adams): Mr. Curry, referring to Defendant's 9, your letter of May 21, 1943, addressed to Mr. Nicodemus—that is correct, isn't it?

A. Yes, sir.

Q. You notice your letter begins by saying: "Enclosed is a copy of Mr. Polk's letter of May 20, 1943, in re: tax matters. Very interesting!"

When you wrote this letter to Mr. Nicodemus, had you read Mr. Polk's letter of May 20?

A. I had.

Q. Had you called it to the attention of Mr. Schumacher?

A. I had.

Q. What was Mr. Schumacher's comment?

A. He returned it to me with the notation, "Interesting letter" and my recollection is that he handed it to me and directed that [585] I send a copy to Mr. Nicodemus.

Q. And do you recall any further discussion with Mr. Schumacher at that time about Mr. Polk's letter?

A. I do not.

(Testimony of Michael J. Curry.)

Q. Did you discuss it with Mr. Schumacher at any later date? A. Not that I can recall.

Q. Now when you said in your letter to Mr. Nicodemus, "Very interesting!", what were you referring to?

A. Well, it was an extensive letter on tax matters and Mr. Schumacher remarked it was very interesting, and I felt the same way.

Q. You hadn't anything particularly in mind beyond that?

A. No, I had nothing in mind particularly. It was a long letter, and some of it I didn't quite understand. [586]

Q. Don't you think it is likely that you were referring to the paragraph in the letter which related to the possible use of the corporation's stock loss in the 1943 return?

A. When I stated "Very interesting"?

Q. Yes.

A. No, I do not recall that that was particularly in my mind.

Q. Do you recall that it was in your mind at all?

A. I do not, no.

Q. You have no recollection about that one way or the other? A. No, I have not.

Q. I would like to show you Railroad's Exhibit 313.

This, your Honor, is Mr. Curry's file copy of Defendants' 9 just offered in evidence, so I do not want to encumber the record with an additional

(Testimony of Michael J. Curry.)

piece of paper, but I will read from the file copy the notation on the file copy that I wish to bring to your Honor's attention. The notation is "Mr. Nicodemus came to office Saturday a.m. 22," and I will hand the document to the witness and ask if that is his memorandum (handing document to witness). A. It is.

Q. You wrote that on your file copy at or about that date? A. Yes, sir.

Q. Do you recall that Mr. Nicodemus did come to the office on the 22nd of May in reference to that letter?

A. I am quite sure he did. I stated here specifically that [587] he came to the office.

Q. Do you have any present recollection of it beyond what is stated in your memorandum?

A. No, my present recollection is that he discussed the matter with Mr. Schumacher and I was informed that he had done so, and I noted it on the file copy.

Q. When you say "discussed the matter," what matter do you mean?

A. The matter of that letter of May 20, 1943.

Q. Do you recall sending a copy of Mr. Polk's letter of May 20 to anyone else other than Mr. Nicodemus?

A. I do not recall, but the copy of my letter would show if it went to anybody else at the time.

Q. I will hand you Exhibit 9, and you have before you the copy of your letter right there in your hand, have you not, Mr. Curry?

(Testimony of Michael J. Curry.)

A. No, there is nothing to indicate on here that a copy went to anybody else but Mr. Nicodemus.

Mr. Adams: I would like to have Railroad's Exhibits 404 and 405. These are documents, your Honor, made a part of the depositions and I will try to describe them briefly. No. 404 is a letter from Mr. Elsey to Mr. Schumacher dated July 20, 1943, enclosing a copy of a letter from a man named Arthur Jansen of Barron's Weekly. Mr. Elsey also encloses a draft of a letter and memorandum prepared for Mr. Schumacher's signature in reply. The subject matter is "Income Tax." No. [588] 405 is Mr. Schumacher's letter to Mr. Jansen, together with Mr. Curry's letter to Messrs. Whitman, Ransom, Coulson & Goetz, and Mr. Polk's letter to Mr. Curry in reply, having reference to the same subject matter. These exhibits contain statements and I will read briefly one statement in here to give your Honor an idea of why we bring this before the Court.

Mr. Phleger: From what?

Mr. Adams: From 404-B.

Mr. Phleger: 404-B?

Mr. Adams: The draft of answer that was sent forward by Mr. Elsey to Mr. Schumacher, proposed to be given to Mr. Janson, and actually afterwards given to him. [589]

* * *

Mr. Adams: Your Honor, I would like to hand to the witness Railroad's Exhibits 404-A to -F and 405.

(Testimony of Michael J. Curry.)

The Court: Is this the correspondence we have been talking about?

Mr. Adams: Yes. 405-A, -B and -C. I will ask him one or two questions about them. I have not made the offer because I want to identify the witness' own notation.

Q. Mr. Curry, referring to Defendants' 404-A, Mr. Elsey's letter to Mr. Schumacher of July 20, 1943, will you please read into the record your own memorandum notation appearing upon the face of that letter?

A. It reads "Discussed 7-26-43. Consulted counsel F. C. N. [593] (Read this.) He suggested I take up with tax counsel. Signed, M. J. C. 7-26-43."

Mr. Phleger: Will it be stipulated that tax counsel was Mr. Polk of the Coulson firm?

Mr. Adams: Yes.

Q. That is correct, is it not, Mr. Curry?

A. That is correct.

Q. Turning to 405-A, the file copy of the letter as actually sent out by Mr. Schumacher to Mr. Jansen on July 30, 1943, will you please read your own notation appearing at the top of that letter?

A. 405-A?

Q. Right.

A. The notation in my handwriting reading "M. C. V."

Q. That refers to Miss Valouch?

A. That refers to Miss Valouch. "Note last paragraph Polk's letter. When you are ready for him let me know and will arrange conference. Signed, M. J. C."

(Testimony of Michael J. Curry.)

Underneath that, "Mr. Schumacher, note Mr. Polk's letter next attached." Initialed, "M. J. C."

Q. Mr. Polk's letter next attached is the letter marked Exhibit 405-B that you have in your hand?

A. 405-B?

Q. Yes. A. Yes, sir. [594]

Q. Will you read into the record your notation appearing on the left-hand side of the paragraph?

A. It states in my handwriting "Discussed 8/4/43, M. J. C. to M. C. V."

Q. Does that refresh your recollection that you had a discussion at or about that time with regard to the application to change over from retirement to depreciation basis for tax purposes?

A. Yes, it refreshes my recollection. [595]

* * *

Mr. Adams: What Mr. Phleger asks is that it be noted that Exhibit 405-B, Mr. Polk's letter to Mr. Curry, is addressed to Mr. Curry as Vice President, Western Pacific Railroad Company.

Mr. Phleger: That is the document as to which the witness has just been interrogated.

Mr. Adams: That is correct.

Q. One question, Mr. Curry, about these papers. In view of the fact that Mr. Jansen's inquiries related to taxes, how did it happen that you took the matter up first with Mr. Nicodemus rather than Mr. Polk?

A. I do not recall the circumstances, but it might have been due to the fact—I will change that. It was probably due to the fact that Mr. Schu-

(Testimony of Michael J. Curry.)

macher asked me to confer with Mr. Nicodemus about it.

* * *

Q. (By Mr. Adams): Mr. Curry, do you recall during the course of your examination by Mr. Clark, you referred to a call which Messrs. Offerman, Jaffin and Wershil made upon you?

A. I do.

Q. In that connection I would like to call to your attention a portion of your deposition, pages 3567 and 3568.

May Mr. Curry have the deposition?

(Deposition handed to witness by the clerk.)

Q. (By Mr. Adams): Now, Mr. Curry, beginning 8 lines from the bottom of page 3567, I will read the questions and answers as [596] put to you by Mr. Clark, the answers as you gave them:

“Q. Were you present at the meeting in Mr. Nicodemus’ office with Mr. Jaffin, Mr. Wershil and Mr. Offerman? A. No, sir.

Q. Directing your attention to the first paragraph of that memorandum, does that first paragraph refresh your recollection in any way?”

Now, your Honor, I see I read something referring to a memorandum, and I must now read what precedes the part I have just called to Mr. Curry’s attention to make it plain.

The Witness: May I ask what page?

Q. (By Mr. Adams): It is the same page, 3567.

As Mr. Curry did not have the page before him, suppose we start afresh.

(Testimony of Michael J. Curry.)

The Court: Very well.

Q. (By Mr. Adams): Mr. Curry, at the top of page 3567, the following question appears by Mr. Clark:

“Q. Mr. Curry, I show you our exhibit No. 61 in this proceeding, which is copy of a memorandum made by Mr. Nicodemus on December 8, 1943, and ask you if that would serve to refresh your recollection as to the time when Mr. Wershil and Mr. Jaffin and Mr. Offerman came to your office at 37 Wall Street (handing to witness)?

A. Yes, sir, it does. [597]

Q. Would you please state first in what way this memorandum refreshes your recollection?

A. I recall the circumstances as stated in this memorandum.

Q. Have you read the entire memorandum?

A. I have.

Q. Were you present at the meeting in Mr. Nicodemus' office with Mr. Jaffin, Mr. Wershil and Mr. Offerman? A. No, sir.

Q. Directing your attention to the first paragraph of that memorandum, does that first paragraph refresh your recollection in any way?

A. Yes. I recall distinctly that it was late in the afternoon, that they did come in, and I did state to Mr. Nicodemus at the time that I did not feel competent to answer their questions and I was sending them over to him.

Q. Do you recall what questions they discussed with you?

(Testimony of Michael J. Curry.)

A. They were in my office but a short time, and they wanted to know if I didn't think that the corporation should get something for the stock that they were turning over to the reorganization committee. And at that time I saw that it was going to be something that perhaps I couldn't answer properly, and I turned [598] them over to Mr. Nicodemus."

Mr. Clark: Suppose you read the next question.

Mr. Adams: I will. The next question, your Honor, is:

"Q. Do you have in mind, Mr. Curry, the agreement of November 22, 1943?

A. Did I have in mind or do I have in mind?

Q. I am asking if you now have it in mind. Do you know what it is I have in mind in mentioning the agreement of November 22, 1943?

A. Yes, sir."

Did you suggest that anything further be read, Mr. Clark?

Mr. Clark: No, that is fine.

Q. (By Mr. Adams): Now, at the time your deposition was taken, Mr. Curry, did you give those answers to those questions? A. I did.

Q. And were they true?

A. Yes, they were.

Q. And are they also true now according to the best of your recollection? A. They are.

Q. Now, then, I would like to direct your attention to a portion of your deposition, the one you

(Testimony of Michael J. Curry.)

have in your hand, beginning at page 3582, beginning three lines from the top of page 3582, and I will read it:

“Q. What was the first occasion, Mr. Curry, upon [599] which you ever heard of the idea that the corporation might share in tax savings on account of the consolidated returns?”

Mr. Adams: And I may say, your Honor, these questions were put at the time by Mr. Clark.

“A. Well, as I remember, it never occurred to me until the time the suit was filed.

Q. When you say at the time the suit was filed, you are referring to the stockholders' suit that was filed in New York in the middle of 1946?

A. Yes, sir.

Q. Do you mean that the first time that you heard any discussion of that was after the suit was filed? A. Yes, sir.”

Q. Now, at that time, when your deposition was taken, did you give those answers to those questions? A. Correctly, yes, sir.

Q. And were they true?

A. Yes, they were.

Q. And are they true now, according to your best recollection?

A. According to my best recollection, they are.

Q. Now, you will notice that in your last answer on that page 3582, that I just read, you say that the first time you ever heard any discussion of the idea that the corporation might share in tax savings on

(Testimony of Michael J. Curry.)

account of the consolidated return was after [600] the stockholders' suit began in New York in 1946?

A. Yes.

Q. Now, that being so, Mr. Curry, it means, does it not, that at the time you had the discussion with Messrs. Offerman, Jaffin and Wershil in December, 1943, that idea was not discussed at that time?

A. The matter of the tax saving was not discussed at that time.

Q. And in your answers that you gave to Mr. Clark when he examined you a day or so ago in connection with this subject, I take it that you did not then intend to say you discussed that subject with Messrs. Offerman, Jaffin and Wershil?

A. I don't quite follow you on that.

Mr. Adams: Would you read it, please. If you don't follow it, Mr. Curry, you are entitled to say so and tell me what is not clear about my question.

(Question read.)

Mr. Adams: Well, I don't wonder that you didn't understand it. It is a little hard to understand. I stated it too long, possibly.

Q. You have in mind, Mr. Clark asked you upon your testimony here in court a few days ago, when you said something about the incident when Mr. Offerman, Mr. Jaffin and Mr. Wershil came in to see you—you remember that?

A. Yes, sir. [601]

Q. Now, then, in the answers you gave to Mr.

(Testimony of Michael J. Curry.)

Clark about that when he was examining you last week, it is true, is it not, that you did not intend to say that you discussed with Messrs. Offerman, Jaffin and Wershil the idea of the tax saving for this tax loss?

A. Well, that is correct. May I continue? My recollection is that about all they said to me was that they felt the stockholders should get something for that stock that was turned over to the reorganization committee; no tax savings mentioned.

Q. That is your best recollection at this time, of the occasion when they saw you? A. Yes, sir.

Q. And that occasion was in December, 1943?

A. Early in December, as I recollect.

Q. Right. That is all I have about your deposition at the moment, Mr. Curry.

Now, do you recall learning, Mr. Curry, in the early part of January, 1944, that the amounts which had been accrued on the railroad company's books for Federal taxes had been reversed?

A. Yes, sir.

Q. And what was your understanding at that time? That is, in January, 1944—what was your understanding as to why those accruals had been reversed?

A. Well, it was my understanding that the matter of tax returns hadn't been decided by the Internal Revenue Bureau and [602] they set that amount up as a contingent tax liability.

Q. Well, you are speaking now of the reserve,

(Testimony of Michael J. Curry.)

are you not? A. The reserve, yes.

Q. What you and I were talking about was about the reversal of the tax accruals; the reversal came, did it not, before the reserve was set up?

A. Yes, it came in December, as I recall.

Q. It was the reversal in the December account?

A. That is as I recall it.

Q. And those December accounts were closed during the month of January and published in that month, of the following year? That is, 1944?

A. That is my recollection.

Q. And there had been before that time a large sum accrued on the railroad company's books for account of Federal taxes? A. That's right.

Q. And then in the December accounts, that accrual was reversed so that the year's statement showed nothing accrued for those taxes?

A. That's right.

Q. And you learned about that in January, 1944? A. I did.

Q. Now, then, what was your understanding at that time as to why the accruals had been reversed?

A. Well, as I stated a while ago, there was a question as to [603] whether or not the returns filed would be accepted by the Internal Revenue Bureau, and it was anticipated that losses would erase any possibility of tax payment.

Q. When you speak of losses erasing tax payment, you mean the major one was the corpora-

(Testimony of Michael J. Curry.)

tion's big stock loss? A. Yes, sir.

Q. That is the \$75,000,000 item?

A. Yes, sir.

Q. And it is the fact, is it not, that that came to your attention in January of 1944?

A. That is my recollection.

Q. And was it your understanding that that loss would be employed as a deduction in a consolidated return to be filed by the parent company?

A. It is my recollection it was talked about at that time, yes.

Mr. Adams: May I ask that Plaintiff's 56 be handed to the witness?

(Document handed to the witness by the clerk.) [604]

The Witness: Plaintiff's 56 is before me.

Q. (By Mr. Adams): And that is Mr. Elsey's letter to Mr. Schumacher of January 24, 1944?

A. Mr. Elsey's letter to Mr. Ehrman with a copy to Mr. Schumacher.

Q. You are correct, and I had particular reference to the letter from Mr. Elsey to Mr. Schumacher, but looking at that one, Mr. Curry, isn't that letter which you have in your hand the original letter from Mr. Elsey to Mr. Schumacher?

A. No, this is a copy.

Q. May I look at it? I have reference, Mr. Curry, to the letter from Mr. Elsey to Mr. Schu-

(Testimony of Michael J. Curry.)

macher.

A. That is defendant's exhibit 319.

Q. Yes, that is a part of Plaintiff's 56, marked also Railroad Defendant's Exhibit 319, that is the original letter, isn't it?

A. Now, this is the original letter, yes, sir.

Q. Have you looked at that? Will you please do so? A. Yes, sir, I have read it.

Q. Does that serve to assist your recollection that in January of 1944 you did learn that it was proposed to set up a reserve fund and that the tax accruals had been reversed?

The Court: He has already testified that that was the case.

Mr. Adams: Yes, I am asking him a question to which I believe the answer is in the affirmative.

The Witness: I do not recollect seeing this letter. There [605] is nothing on it to indicate that I noted it.

Q. What about that line (indicating)?

A. Well, there is a green underscoring under the word "consolidated," indicating that I had read it.

Q. In connection with the reversal of the tax accruals and the proposition to set up a reserve fund, you knew, did you not, that it was contemplated that a consolidated return would be filed and that the corporation's stock loss would be a reduction in the consolidated return? A. I did.

Q. Was Mr. Schumacher also aware of those facts?

(Testimony of Michael J. Curry.)

A. It goes without saying he got the letter, marked it, and was aware of the facts, yes, sir.

Q. You discussed the matter with him?

A. I consulted Mr. Schumacher on everything like that, everything that came in, that I was seeking advice on, and so forth. I consulted with him or with Mr. Nicodemus.

Q. You do recall, do you not, later on you discussed the reserve with Mr. Schumacher?

A. I do.

Q. And you discussed the reversal of the tax accruals with him?

A. Yes, sir.

Q. Do you recall whether or not you discussed these subjects with Mr. Nicodemus or Mr. Campbell?

A. I do not recall that I did. [606]

Q. You have no recollection about it at this time?

A. Not at this time, no, sir.

Q. When it did come to your attention that it was proposed to file consolidated returns, and that the corporation's stock loss would be a deduction on them for the year 1943, did it occur to you that there was anything inappropriate in filing such returns?

Mr. Phleger: I am going to object to that, counsel, if it please the Court, I do not think that is proper cross-examination, and I do not think his answer would be material or relevant, if it were.

Mr. Adams: I think it is appropriate, your Honor. It is a question of his state of mind.

The Court: If he answers "yes" to that ques-

(Testimony of Michael J. Curry.)

tion, I could make a finding in the case that there was an admission by the defendant that it was inappropriate. I do not think that that sort of question is factual in nature. If this witness were to say "yes" to that question, or, rather, to say "no," to that question, then he could be answering that question as an officer of the defendant and I could make a finding based upon that answer, if it were appropriate, in the decision of the case, and I could make it the other way, too.

Mr. Phleger: It is the other way, then.

Mr. Adams: We have no fear of the facts. We feel, your Honor, in a case of this sort that instead of drawing inferences [607] based upon some matters that are not in contest, some facts that are now established that we all agree upon, that your Honor should have the true setting. It is in pursuance of an effort to develop the true setting, what these people did and how they acted, that I am asking these questions.

The Court: That is quite correct, Mr. Adams, but it never adds anything, it does not aid the Judge for a man who is on the witness stand, identified with one of the companies that is involved in the litigation to say whether he thinks it was right or not. You would not need me to decide it then.

Mr. Adams: His bona fides is an issue in the case. It is drawn in issue by the interveners.

Mr. Phleger: There is no issue of this witness' bona fides at all.

(Testimony of Michael J. Curry.)

Mr. Adams: I said the interveners.

Mr. Clark: We are not concerned with what Mr. Curry did or what he knew. This man held two positions. We have shown that and demonstrated. That makes all this line of questioning utterly immaterial. [608]

* * *

The Court: I think it is immaterial. If you attach any great significance to it, I will overrule the objection and let him answer it.

Mr. Adams: Your Honor, I hear the interveners admit that it is immaterial. I would like to hear them say they consider that there is nothing in this case in the way of intentional misconduct. When I hear that, then I may concede it is immaterial. I have not heard it yet.

Mr. Clark: We are not willing to concede that at this point, your Honor, but we will make this statement to your Honor, that Mr. Adams will hear argument from us at the close of this case to the effect that the good or bad faith of these dual officers makes not one bit of difference on the basis of the plaintiff's theory, with which we concur, as to the effect of that duality. In my opening statement I said perhaps the evidence would develop some other second theory, may it please the Court, that we felt it our duty to develop before you. In our view that has developed to some extent on the prima facie case already in.

Mr. Adams: Your Honor has heard the statement.

(Testimony of Michael J. Curry.)

Mr. Clark: It simply amounts to the thing your Honor has heard of a conscious and deliberate use by certain actors in this transaction of the corporation for the benefit of the company, [610] and that has been developed by Mr. Phleger's examination of this witness.

The Court: That is all admitted. There is no question about that. The only question is whether there is any materiality to any claim that there was any conscious fraudulent motivation involved. The facts are what they are, that there was a consolidated return filed, these were the officers of both corporations, and the effect of filing the return was that the operating company, as a result of the loss of the parent company, was free from a certain income tax liability. Those facts are apparently not subject to any dispute in the case. We could have stipulated to that a long time ago. If that does not give rise to a cause of action——

Mr. Clark: There is one further fact, your Honor, and that is that the management of the tax matters was taken over by employees selected and paid for by the defendant company.

The Court: Whatever those facts are, I will overrule the objection. If you wish the witness to answer this question, irrespective of what you are asking your opponents to concede, if you think that that is germane to the case. Repeat the question.

Q. (By Mr. Adams): Mr. Curry, at this time in January, 1944, when it came to your attention

(Testimony of Michael J. Curry.)

that it was proposed to file consolidated returns for 1943 and that it was proposed that the corporation's stock loss should be a deduction in the returns [611] offsetting the income of the court's trustees, did it occur to you that there was anything inappropriate in filing such returns?

A. No, sir.

Q. Did it occur to you that it was in any way unfair to the parent corporation for such returns to be filed——

Mr. Clark: Same objection, your Honor. It is absolutely immaterial.

Mr. Adams: I think it is within your Honor's ruling.

Mr. Clark: Considering the positions this man held.

Mr. Phleger: It is also improper cross-examination.

The Court: He is a witness in the case. I will overrule the objection.

The Witness: It did not.

Q. (By Mr. Adams): Did anyone suggest to you at any time before you heard of the stockholders suit in the middle of 1946 that it was in any way unfair to the corporation for such returns to be filed? A. Not to my recollection.

Q. You knew in January, 1944, did you not, that the corporation on a separate return basis would have no taxable income? A. I did.

Q. Did that fact in any way suggest to you that

(Testimony of Michael J. Curry.)

the corporation should file separate returns?

A. No, it did not.

Q. You knew in January, 1944, did you not, of the November 22, [612] 1943, agreement which called for the transfer of the company's stock held by the corporation and the reorganization committee? A. I did.

Q. Did the fact that this transfer was contemplated suggest to you that the corporation should file a separate return for 1943?

A. It did not.

Q. Was that suggestion ever made to you by anyone before you heard about the stockholders' suit in the middle of 1946? A. No, sir.

Q. I would like to show you a document, being a letter addressed by you to Mr. Nicodemus on March 9, 1944, identified as Railroad Defendant's Exhibit 406. Mr. Curry, is that a file copy of a letter you wrote to Mr. Nicodemus on March 9, 1944? A. It is.

Mr. Adams: Your Honor, this letter refers to the matter of the Delaware franchise tax of the plaintiff corporation, and it winds up with the following end paragraph:

"In view of conditions confronting the corporation filing of consolidated federal income and excess profits tax, etc., I should like to have your advice as to whether payment of the 1941 tax should be made on or before April 1."

Q. Mr. Curry, referring to the portion I just

(Testimony of Michael J. Curry.)

read, does the reference to the 1941 tax refer to Delaware franchise tax? [613]

A. It does.

Q. Would you please read into the record your handwritten notation upon this letter?

A. It reads: "Mr. Campbell discussed this with me and agreed we should request extension to July 1, 1944."

Q. Do you recall that there was a discussion to that effect at that time? A. I do.

Mr. Adams: I offer the document as Defendant's No. 10.

Mr. Clark: Being formerly identified as what, Mr. Adams?

Mr. Adams: As Railroad Defendant's Exhibit 406.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 10.)

Q. (By Mr. Adams): Mr. Curry, referring to our exhibit 10, when you wrote "in view of conditions confronting the corporation filing of consolidated federal income and excess profits tax, etc.," did you assume that Mr. Nicodemus knew that consolidated returns would be filed for 1943?

Mr. Phleger: I object to that upon the ground it is not proper cross-examination. It is utterly immaterial.

The Court: I will sustain the objection. I do

(Testimony of Michael J. Curry.)

not see the relevancy of that, whether he assumed that somebody else knew something.

Mr. Adams: I will ask the next question, your Honor, to indicate what I think is the materiality.

Q. If this was your assumption, what basis did you have for making it? [615]

* * *

The Court: What is the difference between what you are offering and what has already been offered?

Mr. Phleger: That is my point.

The Court: I do not think there is anything that has developed on cross-examination. Is there any dispute about this matter?

Mr. Adams: Oh, yes.

The Court: What is the dispute? [615A]

Mr. Adams: The dispute is this, your Honor, and this is what we expect to hear when we get to argument, that certain gentlemen on our side of the case took this income tax matter in charge and handled it. I am not talking about Mr. Curry. I am talking about certain gentlemen on our side of the case. So they produced Mr. Curry and had him testify that taxes were Greek to him. He has volunteered it three times. All he did was to look at the returns that Miss Valouch presented to him, and when she said they were all right he sent them in blind reliance on what she said, and because she told him that Mr. Polk had looked at them. When this case is brought to your Honor, it is going to be contended, as stated here time and again, that

(Testimony of Michael J. Curry.)

the people on our side, on the defendant's side, handled this transaction and took that belonging to the plaintiff for their own. Now, your Honor, we propose to show that that is not so, and it is partly through this witness. He is not the only witness, but it is our purpose to establish to your Honor's satisfaction, as we think we can, that everybody on the corporation's side who was significant, Mr. Schumacher, Mr. Curry, and the other gentlemen, knew all about this. They were in a position to act for the corporation. They were free. They did not bring it to Judge St. Sure. Why? Because nobody thought of the idea.

The Court: Mr. Adams, I am following what you are saying, but what has that to do with the letters that this witness wrote to Nicodemus about the franchise taxes? How does what you are [616] proving here show anything differently from the letters already put in evidence on the same subject matter? Because he wrote two letters, does that make any difference?

Mr. Adams: No, your Honor. The interveners put before Mr. Curry certain matters about the Delaware franchise tax and he testified they were unrelated to the federal income tax, and I propose to show they were not.

Mr. Clark: Oh, no.

Mr. Phleger: That is not so.

Mr. Clark: The letter is in evidence.

The Court: I may be in error. My memory may

(Testimony of Michael J. Curry.)

not be good, but I think in one of those letters the interveners introduced, Curry to Nicodemus, he referred to the fact that there might be some decision necessary with respect to the franchise taxes because of the filing of the consolidated returns.

Mr. Phleger: Exactly.

Mr. Clark: Exactly. [617]

* * *

Q. Referring to that letter of March 9, 1944——
The Court: Defendants' Exhibit 10.

Q. (By Mr. Adams) (Continuing): ——Defendants' Exhibit 10, Mr. Curry, you will notice your statement there in the last paragraph of that letter?

(Document handed to witness.)

A. Yes, sir.

Q. Now, when you wrote, "In view of conditions confronting the corporation, filing of consolidated Federal income and excess profits tax returns, etc.," was it your understanding that Mr. Nicodemus understood that consolidated returns were to be [628] filed for 1943? A. Yes.

Q. -And what was the basis of your understanding of his understanding?

Mr. Phleger: Well, now, I am going to object to that. I didn't object to the previous question because I wanted to save time. But I think that is not proper cross-examination. I think it is wholly immaterial.

Mr. Adams: I shan't argue it, your Honor. If

(Testimony of Michael J. Curry.)

your Honor considers the question objectionable, I will accept the ruling.

The Court: Well, this is in March of 1944?

Mr. Adams: Yes, your Honor.

The Court: Well, the Coulson firm had already written a letter, hadn't they?

Mr. Adams: Oh, yes, yes, and given advice.

The Court: Concerning the matter?

Mr. Adams: That is right.

The Court: And there has also been evidence here as to this witness' knowledge of that letter.

Mr. Adams: Yes, your Honor.

Mr. Phleger: And that the letter was sent to Mr. Nicodemus.

The Court: And that the letter was sent to Mr. Nicodemus, yes.

Mr. Adams: That is correct.

The Court: That is already in. Now, what is the purpose of [629] this question?

Mr. Adams: We want to establish the relationship between the Delaware franchise tax problem of the plaintiff corporation and the fact that it was planned to file this return for the year 1943——

The Court: Well, that was what he said in this letter.

Mr. Adams: Yes, that is correct. My last question addressed to Mr. Curry was what was the basis of his understanding that Mr. Nicodemus knew of the plan to file such consolidated returns.

The Court: Well, because he had already sent

(Testimony of Michael J. Curry.) .

the letter, hadn't he, to him? That is, Coulson's letter to Nicodemus, which he had received? I think he has already testified to that.

Mr. Adams: Yes. That was May 20, 1943, some ten months before.

Well, I don't want to argue it further, your Honor.

The Court: Obviously this witness knew that Nicodemus knew that they were going to file these returns, because he had sent him all this data.

Mr. Adams: Well, if that would be stipulated by opposing counsel, we would have cleared that question immediately.

Mr. Phleger: After having said he doesn't want any stipulations, it is interesting, at least, that he asks for a stipulation. [630]

The evidence shows that this witness sent a copy of the paradoxical letter to Mr. Nicodemus shortly after it was received. There is no question about that. We put that in as direct testimony. What this man may have thought Mr. Nicodemus thought seems to me the height of immateriality and certainly not proper cross-examination.

The Court: Well, I think that that statement is correct, isn't it, counsel? What do you have to say as to that?

Mr. Adams: I didn't ask Mr. Curry what he thought Mr. Nicodemus thought.

The Court: You asked him what was the basis of his understanding as to what Mr. Nicodemus understood.

(Testimony of Michael J. Curry.)

Mr. Adams: What he knew about this. Now, that is quite a different matter from what people are thinking.

The Court: Well, what is it you want him to answer to that question?

Mr. Adams: What was the basis for his understanding that Mr. Nicodemus knew consolidated returns were to be filed for the year 1943 with the stock loss in them.

The Court: Can you answer that?

The Witness: Well, we had talked about consolidated returns beginning early in '43. Mr. Nicodemus was aware of it, and when I wrote the letter in March 9, 1944, my thought was that he knew that consolidated returns were to be filed.

Mr. Adams: For that year, for the year 1943?

The Witness: For the year 1943. [632]

* * *

February 9, 1949, 10:00 A.M.

Cross-Examination

(Resumed)

By Mr. Adams:

Q. Mr. Curry, did Mr. Polk ever direct you to sign any tax returns? A. No, sir.

Q. The same thing is true, is it not, with respect to the refund claim? A. That is correct.

Q. When you signed the 1943-1944 consolidated returns you knew, did you not, that the plaintiff corporation would not pay any tax on a separate return basis? A. Yes, sir.

(Testimony of Michael J. Curry.)

Q. And when you signed the 1943 return—that was in July of 1944—you knew, did you not, of the reserve fund for contingent tax liability that had been set up by the trustees? A. Yes, sir.

Q. And when you signed the 1943-1944 returns, did you expect that if any taxes were to be assessed upon them, that the taxes would be paid by the companies having income in the group? [636]

* * *

Q. (By Mr. Adams): Do you undersatnd the question, Mr. Curry?

A. Let me have it again, please.

Q. When you signed the 1943-44 returns, who did you expect would pay the taxes if any should be assessed for those years?

A. Well, it was my thought that the company would pay it out of the reserve.

Q. Did you ever suggest to Mr. Polk that he had any duty to advise you or the plaintiff corporation of possible claims of the corporation against other members of the group?

A. Did I ever direct him to advise me?

Q. My question was: Did you ever suggest to him that he had any such duty?

A. No, no. I depended upon him to advise me of our rights, if any, so far as the corporation was concerned.

Q. Did you ever tell Mr. Polk that you depended upon him to advise you of any rights of the corporation against other [638] members of the group?

(Testimony of Michael J. Curry.)

A. I don't recollect that I did.

Q. That is the fact, is it not? You did not give him any such statement? A. I did not.

Q. Did you ever make any such suggestion to Mr. Coulson? A. I did not.

Q. Did Mr. Polk or Mr. Coulson or anyone else connected with the Whitman firm ever refuse to answer any question you asked with regard to taxes? A. No.

Mr. Adams: Now I will ask that Plaintiff's Exhibit 69, Mr. Curry's letter to Mr. Polk of May 5, 1947, be exhibited to the witness.

(Document handed to witness by clerk.)

The Witness: Yes, I have it.

Q. (By Mr. Adams): That is, of course, your letter to Mr. Polk, is it not, Mr. Curry?

A. Yes, sir.

Q. And you prepared that letter?

A. Our attorneys, Mr. Nicodemus, and my recollection is, Mr. Osborn assisted in it.

Q. Yes. That is all I have on that paper.

(Document returned to clerk by the witness.)

Q. Now, with regard to the closing of the New York office, what [639] we have in mind, Mr. Curry, is that the office was physically closed on May 1, 1945? A. As of April 30, 1945.

Q. As of April 30, 1945? A. Yes, sir.

Q. Now, you heard, did you not, that it was

(Testimony of Michael J. Curry.)

planned that the New York office should be closed along about the end of 1944?

Mr. Clark: I will object to that as being vague and indefinite, your Honor. Claimed by whom?

Mr. Adams: I didn't understand I used the word "claimed."

Mr. Clark: I misunderstood counsel, then.

Mr. Adams: Would you read it, please. It may be that I should correct my question.

(Previous question read by the reporter.)

The Court: You mean did he hear it before the end of 1944?

Mr. Adams: Yes.

The Witness: I don't recall that I did.

Q. (By Mr. Adams): When, according to your best recollection, did you first hear about the proposal to close the New York office?

A. Well, it was my recollection that it was definitely brought to me about the 1st of April or the latter part of March of that year.

Q. And from whom did you first hear about that? [640]

A. From some one of the officers of the railroad company who was in New York at the time?

Q. Was that Mr. Droit?

A. Well, I can't say. I remember Droit was here and Engelbright was here and Elsey were—I mean, in New York.

Q. Mr. Droit was the secretary of the railroad company? A. He was.

(Testimony of Michael J. Curry.)

Q. Mr. Engelbright was assistant to the president of the railroad company?

A. That is correct.

Q. And both of those gentlemen had their offices in San Francisco? A. That is correct.

Q. Mr. Elsey was the president of the railroad company? A. Yes, sir.

Q. He had his offices in San Francisco?

A. Yes, sir.

Q. And your recollection, then, is that at some time about April of 1945 you talked to one or more of those gentlemen about the closing of the New York office?

A. That is my recollection, yes.

Q. And is it your recollection that that was your first information that the New York office was to be closed?

A. Yes, it is my recollection that that is about the first time I heard definitely that it was to be closed. [641]

Q. You knew, did you not, that the trustees' operation of the railroad had ceased at the end of 1944?

A. I knew that, yes. And I knew that the trustees, under the court order, were to carry on until May, I believe it was.

Q. Yes, that is correct. That is to say, the trustees' purpose and intent was to continue until May 1, 1945? A. That's right.

Q. But you knew, did you not, that they were

(Testimony of Michael J. Curry.)

no longer operating the railroad after the end of 1944? A. Yes.

Q. Now, in the discussion that you had with Mr. Droit or Mr. Engelbright or Mr. Elsey, any of those gentlemen, did you have any discussion with regard to your personal situation and what might be done about it? A. I don't recall that I did.

Mr. Adams May I ask that Mr. Curry's deposition, the volume containing page 2803, be handed to the witness.

(Handed to the witness by the clerk.)

The Witness: Yes, sir, I have it.

Q. (By Mr. Adams): Now, Mr. Curry, directing your attention to the question in the middle of the page, "Had that subject ever been discussed with you by Mr. Coulson?" I will read some questions and answers which you gave upon your examination by Mr. Clark at the time of taking of your deposition:

"Q. Had that subject ever been discussed with you [642] by Mr. Coulson? A. No.

Q. Or by anyone else?

A. I don't know that it would be a proper answer to say—it was intimated that something would be done for me after the closing of the office. But what was to be done, I had no knowledge.

Q. Who intimated that to you?

A. I think it was either Mr. Droit or Mr. Engelbright of the railroad company, who were in New York prior to this time."

(Testimony of Michael J. Curry.)

Do you recall that those questions were asked and that you gave those answers?

A. Yes, sir.

Q. And were they true? A. Yes, sir.

Q. And now that your recollection is refreshed, do you recall that either Mr. Droit or Mr. Engelbright intimated to you that something would be done for you after the closing of the New York office? A. Yes, I recollect it now.

Q. Now, did you also discuss that subject with Mr. Schumacher? A. Yes.

Q. And please state to the best of your recollection what discussion you had with Mr. Schumacher as to what might be done [643] in your personal connection after the New York office was closed.

A. Well, I don't recollect exactly what was said; it was just a subject that was talked about off and on. I explained to him my personal situation, that I had been advised that the office would close and that there was no place for me in the railroad organization. However, that I understood that Mr. Coulson possibly would have something to offer.

Q. And do you mean that when you discussed the matter with Mr. Schumacher, you had already heard that Mr. Coulson might have something to offer? A. Yes.

Q. And from whom had you learned that before you discussed the matter with Mr. Schumacher?

A. I can't recollect exactly whether it was Elsey, Engelbright or Droit. It was either one of those

(Testimony of Michael J. Curry.)

three that intimated to me that something might be done for me.

Q. And at the time of your discussion with them, then, it was your understanding that something might be done, emanating through Mr. Coulson?

A. Yes, sir.

Q. Now, may I direct your attention to page 3707 of your deposition.

Mr. Adams: It is in another volume, I believe.

(Handed to the witness by the clerk.)

The Witness: Might I say here that these questions, I [644] qualified it at a later testifying?

Q. (By Mr. Adams): You should, Mr. Curry, if you fail to state that; you are entirely correct in asking to do so. Go ahead and make any statement you wish.

A. The only thing I had in mind was I believe I stated the first intimation I had of what Colonel Coulson had in mind was the letter I received from him of June 6, I think it was. I later qualified that by stating I recall that he did call me over to the office and told me that he had something in mind for me, but he mentioned no figure.

Q. When you were speaking of that discussion with Mr. Coulson and of the later letter, they came, did they not, after you had had your discussions with Mr. Droit and Mr. Engelbright?

A. Yes.

Q. And after you had your discussions with Mr. Schumacher?

A. That is right.

(Testimony of Michael J. Curry.)

Mr. Adams: I think this would be just cumulative, and therefore I won't go into it. I refer to page 3707, Mr. Curry, and if you desire to look at it, I suggest that you do that. If after looking at it you want to say anything further, you are privileged to do so. It is right there in front of you.

The Witness: 3707?

Mr. Adams: 3707.

The Witness: Yes, that is what I just testified to.

Q. (By Mr. Adams): It is the fact, is it not, Mr. Curry, that [645] you did not solicit the retainer arrangement? A. That is correct.

Q. It came to you unsolicited on your part?

A. Yes, sir.

Q. I would like to direct your attention to a letter from Mr. Coulson to you dated June 6, 1945, which is Plaintiff's Exhibit 33 in the case.

I desire, your Honor, to draw to Mr. Curry's attention Plaintiff's Exhibit 33. I had better read the whole letter. It is short.

“Enclosed is the check of this firm for \$750, which represents a quarterly payment on your retainer by this firm for services in connection with the pending tax matters with which we are dealing in behalf of the Western Pacific Railroad Company. As agreed, this retainer is to be on an annual basis of \$3000, and this quarterly installment covers the period from May 1 to July 31, 1945. You will note that there are no deductions from this check on account of taxes or social security premiums, since

(Testimony of Michael J. Curry.)

you are in no sense an employee of this office or the Western Pacific Railroad Company, but are merely retained as an independent contractor to make studies and reports and perhaps subsequently act as a witness [646] in connection with the pending tax problem.”

Mr. Curry, does this letter state your understanding of the purpose of your retainer?

A. Yes, it was a standby arrangement in connection with—for use of me in connection with tax matters.

Q. Did you have any different understanding of the purpose of your retainer from what is stated in that letter? A. I did not.

Q. Did Mr. Coulson or any of his associates ever suggest to you that your retainer had any different purpose? A. No, sir.

Q. Did you understand that your retainer had obliged you in any respect to take any action adverse to the corporation's interests?

A. No, sir.

Q. During the period of your retainer, which ran from this time in 1945, when it began, until the end, 1948, did you ever take any action which you considered adverse to the interests of the corporation? A. No, sir.

Q. Did you consider that your action in signing the 1944 tax return, which you signed in your office over there at 40 Wall Street in the Whitman, Ransom suite, did you consider that that action was in any way disadvantageous to the corporation?

(Testimony of Michael J. Curry.)

A. I did not. [647]

Q. When you signed that return you signed it, did you not, in your capacity as president of the plaintiff corporation?

A. I believe it was signed in the capacity of treasurer—president and treasurer.

Q. President and treasurer?

A. That is right.

Q. During the time you were in receipt of the retainer and occupying an office in the Whitman, Ransom suite, you felt entirely free, did you not, to take any action in behalf of the corporation which you thought was required in its interest?

A. Yes, sir.

Q. And you likewise felt entirely free, did you not, to decline to take any action which you thought was disadvantageous to the corporation?

A. Yes, sir.

Q. I have no further use of the document, Mr. Curry. Did you advise the board of directors of the plaintiff corporation of your retainer by the Whitman, Ransom firm and your occupancy of an office in their suite?

A. I do not recall that I did at a board meeting, but they were all advised as I saw them subsequently.

Q. When you say they were all advised, do you mean——

A. I informed them of the retainer arrangement.

Q. And that includes Mr. Nicodemus, does it not?

(Testimony of Michael J. Curry.)

A. I am not sure that I mentioned it to Mr. Nicodemus at the [648] time.

Q. Did you advise Mr. Campbell, Mr. Nicodemus' partner?

A. I have no definite recollection of it at this time.

Q. May I ask that you refer to your deposition, page 3702? A. Yes, sir.

Q. 3706, Mr. Curry. I misspoke as to the page number, beginning with the question in the middle of the page 3706, these questions being put by me at the time of the taking of your deposition:

“Q. Do you recall whether Mr. Nicodemus discussed with you the matter of the effect upon your personal financial situation of closing the New York office? A. I do not recall that he did.

Q. Did you discussion that subject with Mr. Schumacher? A. I did, yes, sir.

Q. What was that discussion, Mr. Curry?

A. Well, as I recall it, we went into the matter from the standpoint of the salary that I was getting at that time, and the fact, having become 65 or over, that I was to get a pension from the railroad company under the provisional retirement plan that was effective January 1, 1945, as I recall.

Q. And was it under that provisional retirement plan that you were to draw down an amount of some \$88 a month? [649]

A. \$89.54.

Q. Do you recall whether you had any discus-

(Testimony of Michael J. Curry.)

sion with Mr. Schumacher in regard to you receiving a retainer from Whitman, Ransom, Coulson & Goetz?"

I think I directed your attention to this. I will read the answer.

"A. I do not recall whether we discussed anything like that as a retainer. I understood at the time that some consideration was being given to taking care of me in some way because of the closing of the office and the cutting me off from the payroll, and so forth, but what it was I didn't know at that time."

Your Honor, I read something on my own examination that I am sure is not as close to this subject as it ought to be, so I do not think this is proper cross-examination. In fact, I will say so myself. I thought this came more closely to the knowledge of the directors about the occupancy of the office and the retainer.

Q. Mr. Curry, I want to ask you about that: Who among the members of the board of directors to your knowledge were acquainted with the fact that you were receiving a retainer from the firm of Whitman, Ransom, Coulson & Goetz?

Mr. Phleger: That calls for a conclusion. I have no objection to his asking him whether he told them.

Mr. Adams: I will submit the question, your Honor. It is [650] to his knowledge.

The Court: If it is within his knowledge I will allow it.

The Witness: The question, please?

(Testimony of Michael J. Curry.)

(Question read.)

The Witness: I do not remember.

Q. (By Mr. Adams): Mr. Curry, please state what you do remember about having discussed that matter with the directors from time to time after you came into the occupancy of that office.

A. I have no recollection of the discussion. All I recall is when the time was opportune, I mentioned it to the directors individually.

Q. It is your recollection that you mentioned it to each of them individually from time to time?

A. Yes, sir, that is my recollection.

Q. I do find the place in the record I was looking for, if I may have that last volume handed back to Mr. Curry. 3703. Mr. Curry, beginning six lines from the bottom of page 3703 of your deposition, I will read you the questions I put at the time of the taking of your deposition and your answers:

“Q. Did you after you moved into your office over at Whitman, Ransom, Coulson & Goetz office at 40 Wall Street, did you at some time thereafter inform the other directors that you had your office there?

A. It is my recollection that at a meeting of the [651] board I notified them of that, yes, sir.

Q. Do you recall when you notified the directors of that fact?

A. Well, it was at a meeting very shortly after I moved, the first meeting, as I understand it. It

(Testimony of Michael J. Curry.)

was just a matter of notifying them that I was coming over to 40 Wall Street.”

You recall giving those answer to those questions? A. I do, yes.

Q. Are they correct according to your present recollection of the matter?

A. It was my recollection at that time when I gave this testimony that it was at a meeting of the board. Upon reflection, it might have been after the close of the meeting or later that I encountered the directors and informed them of the fact.

Q. Now, if you will turn to page 3705, six lines from the bottom:

“Q. Is it your recollection that it was at the meeting of July 31, 1945, that you told the directors that you had your office in the suite of Whitman, Ransom, Coulson & Goetz?

A. That is my recollection at the moment. I saw the directors in the meantime, and as I recall, informed them that my office was at 40 Wall Street.”

Do you recall giving that answer to that question?

A. Yes, I do.

Q. Is that now correct according to your best recollection? A. Yes.

Q. Did any member of the board ever take any exception to the arrangement about the office and your retainer? A. None whatever.

Q. During the time your office was in the suite of Whitman, Ransom, Coulson & Goetz did you

(Testimony of Michael J. Curry.)

carry on your activities as president of the corporation from that office? A. I did.

Q. Did Mr. Coulson or any other person connected with the Whitman firm ever attempt to interfere with your activities as president of the corporation? A. No, sir.

Q. And did Mr. Coulson or anyone else connected with that firm ever attempt while you were in that office to influence your conduct as president of the corporation? A. No, sir. [653]

Q. Is it fair to say, Mr. Curry, that during the period you were retained by the Whitman, Ransom, Coulson and Goetz firm, you conducted the corporation's affairs to the best of your ability for the best interests of the corporation?

A. Yes, sir.

Mr. Adams: Now I will ask the witness to turn to page 2804 of his deposition.

(Handed to the witness by the Clerk.)

Q. (By Mr. Adams): Beginning at the bottom of page 2804, I will read a portion of some questions put to you by Mr. Clark and your answers: (reading)

“Q. What services, if any, have you rendered pursuant to the retainer arrangement which is outlined in Interveners' Exhibit 38?”

Which I identify as Plaintiff's Exhibit 33.

Q. (continuing):

“A. The only service that I performed since this

(Testimony of Michael J. Curry.)

arrangement was effective was in executing the tax returns as treasurer of the corporation.

“Q. What tax returns do you refer to?

“A. The consolidated tax returns of 1942, 1943, and 1944.

“Mr. Shaw: I would suggest, Mr. Clark, that you refresh the witness’ recollection as to the time on this.

“Q (By Mr. Clark): You will observe, Mr. Curry, that according to Interveners’ Exhibit 38, the retainer [654] arrangement which is outlined therein did not commence until as of May 1, 1945.

“A. That is right.

“Q. Bearing that in mind, do you want to change your last answer?

“A. I do. I was mistaken.

“Q. Would you please now answer the previous question, namely, as to what services, if any, you have rendered to date under this retainer?

“Mr. Shaw: Since May 1, 1945.

“Mr. Clark: I will accept that qualification.

“Q. (By Mr. Clark): Answer the question.

“Mr. Osborn: ——”

He was one of the plaintiff’s counsel, your Honor, and is, of course, he is on the record.

“Mr. Osborn: I would like to point out to the witness, if I may, that your question calls for a conclusion by the witness; that he might not have performed any services under the retainer.

“Mr. Clark: If he did not, he can say so.

(Testimony of Michael J. Curry.)

“A. I cannot recall that I have performed any services under that retainer.”

Now, Mr. Curry, do you recall giving those answers? A. I do.

Q. And referring to the last answer, “I cannot recall that I [655] performed any services under that retainer,” is that correct?

A. Well, outside of the tax return that I signed while in that office, and the power of attorney, those are the only services I can recall that I performed.

Q. Well now, you had in mind at the time you gave your testimony, did you not, the tax returns? You will notice that the record I just read to you referred to the tax returns, and I am asking you if, at the time you gave that testimony, you did not have that in mind.

A. Well, as I recall, I was confused as to certain questions that were asked of me at that time, and inasmuch as it was June 1, 1945, that I went over to the 40 Wall Street office, the only services that I performed while there was the execution of the '44 federal tax return and the power of attorney.

Q. Now, Mr. Curry, is it your understanding that you were being paid by the retainer to sign that return?

A. The only thing I understood by that was that I was to stand by; it was a stand-by arrangement. There was no understanding as to just what I would be called upon to do, and I just continued along in that office waiting for anything I might do in connection with the object of that retainer.

(Testimony of Michael J. Curry.)

Q. You bear in mind, do you not, that the retainer was not paid to you so that you could sign a return; isn't that the fact?

A. Well—— [656]

* * *

A. Specifically, that is the fact, yes.

Q. (By Mr. Adams): And when you gave your last answer that I read to you, "I cannot recall that I have performed any services under the retainer," you believed at that time, did you not, that that answer was correct?

A. Yes, because it was a tax return; it was a tax matter and the letter of June 6 stated specifically I was to stand by on tax matters. And as that was one of the functions of the president and treasurer, to execute these tax returns—— [658]

* * *

Q. Mr. Curry, do you recall in your examination by Mr. Phleger two days ago, the following questions and answers? Page 323, Mr. Phleger, towards the bottom.

"Q. (By Mr. Phleger): I show you, Mr. Curry, Plaintiff's Exhibit No. 54, which is a letter on the Coulson letterhead dated January 11, 1944 addressed to Mr. Elsey advising with respect to the 1943 tax accruals, their reversal and other matters. That is the so-called opinion letter. Did you receive a copy of that letter?

"A. I did not.

"Q. Did you ever see a copy of that letter?

(Testimony of Michael J. Curry.)

tion of the agenda for board meetings and preparation of the minutes, incidental things like that.

“Q. Did you consider the signing of these tax returns one of the necessary acts to be carried on by you for the corporation?

“A. Yes, I did.”

Q. Did you give those answers to those questions at that time, Mr. Curry? A. I did.

Q. And did you then believe they were true?

A. Yes, sir.

Q. And are they true, according to your recollection? A. Yes, sir.

* * *

No. 12506

United States
Court of Appeals
for the Ninth Circuit.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I.
duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO
NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY,
DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY
COMPANY, THE STANDARD REALTY AND DEVELOPMENT
COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE
& CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO
NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY,
DEEP CREEK RAILROAD COMPANY, THE WESTERN
REALTY COMPANY, THE STANDARD REALTY AND DE-
VELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

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Transcript of Record
In Five Volumes

Volume III
(Pages 911 to 1361)

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Southern Division.

FILED
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Appeals from the United States District Court,
Northern District of California,
Southern Division.

ROBERT BUCHANAN

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court, please?

A. Robert Buchanan.

Direct Examination

By Mr. Phleger:

Q. Mr. Buchanan, where do you live?

A. I live at 2306 Leavenworth Street, San Francisco.

Q. What is your occupation? [663]

A. I am a certified public accountant.

Q. With what firm are you associated?

A. Lybrand, Ross Bros. & Montgomery.

Q. How long have you been associated with that firm?

A. About 25 years.

Q. What has been your experience in the field of accountancy?

A. Well, I have been with that firm of certified public accountants, and for that period of time. In fact, a somewhat longer time than that. In that time I have been the manager of the tax department in San Francisco.

Q. For how long have you been manager of Lybrand's tax department in San Francisco?

A. Approximately 25 years.

Q. Are you licensed to practice before the Treasury Department?

A. Yes, sir.

Q. Have you testified before as an expert in court on tax matters?

A. I have.

(Testimony of Robert Buchanan.)

Mr. Phleger: Before proceeding further with the examination of this witness, your Honor, I would like to offer in evidence certain documents bearing upon this particular matter, before proceeding with the specific questions.

I would first offer in evidence the following sheets, which are identified by the following designations: Interveners' 128A, 128B, 128C, 128D, 128E, 128F, and Interveners' 85A. [664] Those, may it please the Court, are computations which I am sure counsel will stipulate were prepared by Mr. Reilly of the Coulson firm.

Mr. MacKinnon: Mr. Reilly is not in the Coulson firm; never has been.

Mr. Phleger: Will you stipulate that he was employed and paid for by the Coulson firm in connection with the preparation of these tax returns?

Mr. Adams: No, I think that that is an inaccurate statement of Mr. Reilly's position. His charges are taken up in the bill you have seen, and those charges were paid by the railroad company.

Mr. Phleger: Well then, we will make it more specific, since you won't help me; and that is that Mr. Reilly was employed in and about the preparation of these returns, under the direction of Mr. Polk, that his current salary was paid by the Coulson firm, but the Coulson firm has now billed the railroad company for the amounts paid by it to Mr. Reilly.

(Testimony of Robert Buchanan.)

Mr. Adams: Mr. Phleger, and your Honor, there is no purpose to have anything but an accurate statement here, and I am sure that is what we all want. Now Mr. Reilly was in the employ of Consolidated Edison. He did some special work as an accountant in connection with this matter. I am a little troubled by being asked for statements that frankly, just from my own recollection, I cannot be sure are accurate in detail. [665] Mr. Reilly's position in the matter has been developed here. He worked in the office of the plaintiff corporation as an accountant.

Mr. Phleger: On these tax matters?

Mr. Adams: These tax matters.

Mr. Phleger: Right. And these are sheets prepared by him.

Mr. Adams: That is my recollection.

Mr. Phleger: Without going into them more—in fact I won't go into them further, other than to state that these were computations made in the fall of 1946 at the request of Mr. Polk, as to what the taxes would have been in this matter had the returns not utilized the stock loss.

I will offer that as Plaintiff's Exhibit 73.

(Intervener's Exhibits 128A through F, inclusive, and Interveners' 85A, referred to above, were received in evidence and marked Plaintiff's Exhibit 73.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 74, three sheets otherwise identified as Inter-

(Testimony of Robert Buchanan.)

vener's 114A, 114B, and 114C, consisting of a letter on the letterhead of the Western Pacific Railroad Company, dated November 8, 1943, addressed to Mr. James K. Polk, New York, by Mr. D. C. DeGraff, general auditor of the Western Pacific Railroad Company, showing the amounts that were being accrued on the books of the defendant corporation for 1943 taxes and the estimate of the total amount for that year. [666]

Mr. Clark: On a consolidated basis, isn't that right?

Mr. Phleger: That is correct; on the way that they were actually accrued for the period up to that date, and estimated for the balance of the year.

Mr. Clark: And without reference to any use of the stock loss. [666A]

Mr. Phleger: Correct.

(Letter dated November 8, 1943, from DeGraff to Polk, was received in evidence and marked Plaintiff's Exhibit 74.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 75 two sheets otherwise identified as Railroad Company's Exhibits 898 and 898-A, consisting of a letter signed by Mr. Charles Elsey, directed to Mr. Robert E. Coulson, dated November 13, 1943, giving an estimate of the income of the railroad for the current year, 1943, and containing the following statement:

"Please note that these statements are on the basis of estimated Federal taxes in the amount of

(Testimony of Robert Buchanan.)

\$8,274,000, which have been calculated as set forth in detail on a statement submitted by Mr. DeGraff to Mr. Polk by letter dated November 8, 1943."

. (Letter dated November 13, 1943, from Elsey to Coulson, was received in evidence and marked Plaintiff's Exhibit 75.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 76 the following sheets, identified as follows: Interveners' 455-A, 455-B, 455-C and 455-D.

These, may it please the Court, are the journal entries on the books of the defendant corporation, showing on the top sheet, 455-A, the reversal of the accruals for the Federal income taxes for the year 1943, in the amount of \$7,069,052. The second sheet, 455-B, shows the accrual in the month of [667] January, 1944, of railway tax accruals—no, strike that—of United States Government Federal income taxes in the amount of \$893,000. It shows on the next sheet the accrual for March, 1944, of United States Government Federal income taxes, in the amount of \$932,300. On 455-D the accrual of U. S. Government Federal income taxes shows in the sum of \$1,282,700.

(Interveners' Exhibits 455-A through -D, inclusive, were received in evidence and marked Plaintiff's Exhibit 76.)

Mr. Phleger: Will it be stipulated, Mr. Adams, that the accruals just mentioned for the year 1944, January to March, were on a consolidated basis but

(Testimony of Robert Buchanan.)

not including the plaintiff corporation; namely, a consolidated basis with the railroad company as the top corporation?

Mr. Adams: That is my understanding.

Mr. Phleger: In other words, the returns for the first four months, as shown by the books, did not include the consolidation which later was used in the returns for the first four months of '44?

Mr. Adams: I think that is an inadvertent statement; if you were to hear it read, you would find you started it out, "In other words, the returns for the first four months"—what you had in mind was that the accruals during the first four months of the year 1944 as entered upon the accrual books did not include anything on account of the plaintiff corporation or its loss. [668]

Mr. Phleger: Yes. It was not on a consolidated basis, including the plaintiff corporation.

Mr. Adams: That is right.

Mr. Phleger: Contrary to the returns which were later filed, which did include a consolidation with the parent corporation.

Mr. Adams: Yes. And may it be stipulated that the books of accrual were adjusted before the end of the year in conformity with the returns as filed?

Mr. Phleger: I will so stipulate.

I will now offer as Plaintiff's Exhibit 77-A a copy of the corporation income and declared value excess profits tax return of the Western Pacific Railroad Corporation, and affiliated corporations,

(Testimony of Robert Buchanan.)

for the year 1940, and as 77-B the excess profits tax return of the Western Pacific Railroad Corporation for the same year, 1940.

Mr. Adams: Those are for the corporation, are they not?

Mr. Phleger: For the corporation and affiliated companies.

Mr. Adams: Yes.

(Corporation income declared value excess profits tax return for Western Pacific Railroad Corporation, 1940, and excess profits tax return of Western Pacific Railroad Corporation, 1940, referred to above, were received in evidence and marked Plaintiff's Exhibits 77-A and 77-B.)

Mr. Phleger: Those, may it please the Court, are required as a foundation for some estimates which we will shortly offer. [669]

I will now offer as Plaintiff's Exhibit 78-A the corporation income and declared value excess profits tax return of the Western Pacific Railroad Corporation and affiliated companies for the year 1941 as Plaintiff's Exhibit 78-B the corporation excess profits tax return of the Western Pacific Railroad Corporation and affiliated companies for the year 1941.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 78-A and 78-B.)

(Testimony of Robert Buchanan.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 79-A the corporation income and declared value excess profits tax return of the Western Pacific Railroad Company and affiliated companies for the period beginning May 1, 1944, and ending December 31, 1945. May it please the Court, that is the return of the defendant and its affiliated corporations for the last eight months of 1944. The return, as you will recall, for the first four months of that year, was a return of the plaintiff corporation and the defendant corporation and its subsidiaries, and for the plaintiff corporation for the entire year. In other words, the consolidation with the defendant was only for the first four months, these being the separate returns of the defendant corporation and its affiliated corporations for the last eight months.

Mr. Adams: Those last eight months, Mr. Phleger, being the last eight months of the operations of the court's trustees. That is correct, is it not?

Mr. Clark: That is true, 1944.

Mr. Phleger: Well, I think that is true. The dates speak [670] for themselves.

(Corporation income and declared value excess profits tax return of Western Pacific Railroad Company and affiliated companies, May 1, 1944, to December 31, 1945, was received in evidence and marked Plaintiff's Exhibit 79-A.)

(Testimony of Robert Buchanan.)

Mr. Phleger: The returns are signed by Mr. Elsey as president of the company.

I offer next as Plaintiff's Exhibit 79-B the excess profits tax return of the Western Pacific Railroad Company and affiliated companies, also for the last eight months of 1944.

(Excess profits tax return of Western Pacific Railroad Company and affiliated companies for last eight months of 1944 was received in evidence and marked Plaintiff's Exhibit 79-B.)

Mr. Phleger: I will now offer for identification Plaintiff's Exhibit 80, consisting of three sheets. Copies of this, may it please the Court, have already been given to counsel. I ask that this be marked for identification. You might desire to follow this. Will you give that to the Court?

(Copy of document handed to Court through clerk.)

Mr. Phleger: The exhibit consists of three sheets headed, respectively, "Basis 1," "Basis 2," and "Basis 3."

(The sheets referred to were marked Plaintiff's Exhibit 80 for Identification.)

Q. (By Mr. Phleger): Mr. Buchanan, I direct your attention to Plaintiff's Exhibit 80 for Identification (handing to witness), [671] and will ask you if you prepared this exhibit. A. I did.

Q. Did you prepare it at the request of attorneys for the plaintiff? A. I did.

(Testimony of Robert Buchanan.)

Q. And pursuant to their instructions?

A. I did.

Q. I direct your attention now to the first page of the exhibit, entitled "Basis 1," and to the heading reading, "The Western Pacific Railroad Corporation and its Affiliates, Federal Income Taxes and Excess Profits Taxes, on a Separate Return Basis, Using the Data as Actually Shown in Consolidated Returns Filed."

Will you please state to the Court how this basis 1 was prepared and what it shows.

A. May I have access to my working papers?

The Court: Yes.

Mr. Phleger: Yes, you may.

(Witness produces papers.)

The Court: This witness is testifying as to what the income taxes would have been had separate returns been filed?

Mr. Phleger: Exactly.

The Court: All right.

A. These exhibits were prepared, using as the basic material the returns or photostatic copies that were furnished to me by Mr. Phleger. The returns of the—— [672]

Mr. Phleger: Just a moment. It will be stipulated—or perhaps I had better have Plaintiff's Exhibit 3, 4 and 5, the tax returns.

(Documents handed to counsel by the clerk.)

Q. (By Mr. Phleger): I show you, Mr.

(Testimony of Robert Buchanan.)

Buchanan, Plaintiff's Exhibits 3-A, 3-B, 4-A, 4-B, 5-A and 5-B (handing to witness), and I ask you if those are the returns or copies of them which you used in the computation you have just referred to.

A. These returns, plus the returns for 1940 and '41.

Q. Those are the ones which were just introduced in evidence? A. That is correct.

Q. As Plaintiff's Exhibit 77, 78 and 79?

A. That is correct.

Mr. Adams: The witness has not mentioned 79. You may wish to ask him about 79.

Mr. Phleger: 79 is the last eight months.

Mr. Clark: Of '44.

Mr. Phleger: He did use that.

The Witness: Yes, '44.

Q. (By Mr. Phleger): Will you now proceed.

A. Now, the material found in those returns are the basic material on which these computations were made, and in which it was determined on Basis 1 that on a separate return basis there would have been a tax payable by these companies aggregating \$21,622,358.71. [673]

The same material—that is, the material contained in the returns—was used in computing the tax shown on Basis 2. The difference between the two—that is, between Basis 1 and Basis 2—being primarily the carry-forward of certain net operating loss carry-overs and unused excess profit credit carry-overs.

(Testimony of Robert Buchanan.)

Q. Will you refer, Mr. Buchanan, to the title of Basis 2 and state from it or your recollection of the specific method in which this was prepared.

A. Well, the title is "The Federal Income and Excess Profits Taxes on a Separate Return Basis, Using the Data as Actually Shown in the Consolidated Returns Filed, and Giving Each Affiliate the Benefit of Any Operating Loss Carry-over or Unused Excess Profits Credit Carry-over Attributable to It, Though Contrary to Regulations 110, Section 33.31(e) and (f)."

Q. And will you state what those regulations were?

A. Well, the regulations provided that for that type of loss or carry-over which had accrued prior to January 1, 1942, it could not be carried over to the separate returns of the individual companies if they made separate returns.

Q. And you therefore in this computation did not follow that regulation, but gave the separate companies the benefit of their own carry-over?

A. That is correct.

Q. Which otherwise they would have been deprived of had they filed [674] separate returns, because of having earlier filed consolidated returns?

Mr. MacKinnon: Just a moment. I object to that; that is a question of law for your Honor to decide, whether or not the regulations so provided. That is a question of law.

(Testimony of Robert Buchanan.)

Mr. Phleger: Well, I am asking him what he did.

Mr. MacKinnon: No, you were asking him for his opinion. That is the basis of my objection to the question.

The Court: Well, you are trying to find out from this witness whether or not his calculations were based upon that conclusion, is that it?

Mr. Phleger: That is correct. In short, may it please the Court——

The Court: If that is the question, I will overrule the objection.

Mr. Phleger: Will you read the question.

(Previous question read by the reporter.)

A. That is correct.

Mr. Phleger: I don't know whether I made my point clear to your Honor, but this was prepared under our instructions to give the benefit to the individual companies of privileges they would not actually have had.

The Court: This witness is of the opinion that they couldn't take this deduction, but that the calculations are based on the assumption that they could have taken it, is [675] that what you mean?

Mr. Phleger: Correct.

The Witness: That is correct, sir.

Q. (By Mr. Phleger): Now, I direct your attention to Basis 3.

The Court: That doesn't mean I am accepting the conclusion of law.

(Testimony of Robert Buchanan.)

Mr. MacKinnon: I understand, your Honor. I will say it is a question of law for your Honor to determine. [675-A]

Q. I direct your attention now to basis 3. Will you state what that shows, the basis on which it was prepared?

A. As stated in the heading, basis 3 was computed on the basis of a consolidated return or returns which were filed but excluding the corporation's stock loss of some \$73,000,000.

Mr. Phleger: I will offer this now as Plaintiff's Exhibit, having been marked for identification previously.

(Plaintiff's Exhibit 80 for identification previously was thereupon received in evidence.)

Mr. Phleger: That is all.

Mr. Clark: No questions from us, your Honor.

Cross-Examination

By Mr. Adams:

Q. Mr. Buchanan, do I understand correctly that the figures and all the figures which you used in making these computations are figures to be found upon the income and excess profits tax returns for 1940, 1941, 1942, 1943, and 1944 for the parent corporation and likewise return of the Western Pacific Railroad Company and its affiliates as a consolidated return for the last eight months of the year 1944?

A. That is correct.

(Testimony of Robert Buchanan.)

Q. You did not go to any other source material whatever? A. No.

Q. Now, referring to basis 1, do I understand that basis 1 is your computation made up from the use of those figures and those returns of what the federal income and excess profits tax [676] liabilities of those companies shown on your schedule would have been if each of the companies had filed separate returns for the years 1942, 1943 and 1944?

A. If you will look at basis 1, you will see that the period is January 1 to April 30, 1944, so that when you say 1944 you are speaking of that period. That is what this basis 1 says. The reason I answer in that fashion is there might be some confusion because for the calendar year 1944 the parent corporation, that is, the Western Pacific Railroad Corporation, filed a consolidated return in which it included its income for the entire year and included the income of these subsidiaries for the four months' period, and then subsequently a consolidated return was filed for the last eight months of the calendar year 1944 by the Western Pacific Railroad Company and its subsidiaries, but in this computation in basis 1 we refer to this period as the January 1 to April 30, 1944, period.

Q. Just to get my understand of this year, we refer only to the year 1942, referring to the figures computed on your basis 1, are the figures shown for that year your computation of what the tax liabilities of these several companies would have been had

(Testimony of Robert Buchanan.)

each of them filed separate returns for that year?

A. For the calendar year 1942.

Q. Based upon those figures you have taken from a consolidated return?

A. Based upon those figures taken from the consolidated return [677] for the calendar year 1942.

Q. Is the same thing true with regard to the year 1943, as shown on your schedule basis 1?

A. That is correct.

Q. Would you please explain to me how you calculated the figures under the column, "Period January 1 to April 30, 1944"?

A. I would like to refer to the return itself, if I may.

Q. Yes, you are privileged to do that, surely.

Mr. Phleger: Might I suggest to your Honor that perhaps if those papers were laid over on this desk——

The Court: Yes, he has room to lay them out there. The witness might testify from down to that table, if you will.

The Witness: Basis 1, the period January 1 to April 30, 1944: that was based on the income shown in the consolidated return for the Western Pacific Railroad Company and Corporation. Its income was included therein, and that was for the four-month period as stated at the top of the schedule called basis 1, Period January 1 to April 30, 1944, and that is based on the net income of the Western Pacific Railroad Company for that four-month pe-

(Testimony of Robert Buchanan.)

riod, included in the consolidated return that was filed for the Western Pacific Railroad Corporation and its affiliated companies for the calendar year 1944, showing a net income of \$2,975,142.13, and this tax shown in basis 1 is on the basis of the Western Pacific Railroad Company filing a separate return showing that net income for that period.

Q. (By Mr. Adams): Is the same thing true, Mr. Buchanan, with respect to the smaller amounts for Tidewater Southern and Western Realty and Standard Realty and Development Company which are listed under that period on your basis 1?

A. That is correct.

Q. So where you obtained the figures entered in that column was to go to the corporation's consolidated returns for the year 1944, which included these first four months of 1944, and you obtained your income figures out of that return for this period?

A. That is correct.

Q. And you made calculations of those income figures that you derived from that return?

A. That is correct.

Q. With regard to the columns for the years 1942 and 1943 on your basis 1 calculation, do I understand that in each of those cases you simply took the figures shown in the consolidated returns filed for each of those years as the income figures?

A. That is correct.

Q. And then you made tax calculations on the income figures taken directly from those returns?

A. That is correct.

(Testimony of Robert Buchanan.)

Q. It is not necessary for you to stand, Mr. Buchanan.

A. It is easier for me to find the figures in here if I stand. May I be permitted to stand?

The Court: Yes. [679]

Q. (By Mr. Adams): In your computations of them on basis 1, did you change any of the income or deduction figures found in those returns as filed in making up your estimates of tax liability on basis 1?

A. No. For example, the Western Pacific Railroad Company in the return I am looking at, the consolidated return for year ended December 31, 1944, the statement of income in the Western Pacific Railroad column shows a net income of \$2,975,-142.13, and that is the figure I used in making these calculations that are shown on basis 1 on a separate return basis.

Q. Isn't that last figure that you just read a figure about the four-month period of 1944?

A. That is correct.

Q. I was speaking of the full calendar year, calculations shown on basis 1. A. Yes.

Q. Is it likewise true in those cases that you did not change any income or deduction figures shown on those returns in the making up of your tax computation? A. That is correct.

Q. Did you give any attention in making up your tax calculations on a separate return basis to the inter-company accounts between members of this group of affiliated corporations?

(Testimony of Robert Buchanan.)

A. Yes, I did. First, may I refer to a schedule I have of those inter-company accounts set up?

Q. Yes.

A. I prepared a schedule showing the inter-company interests. For example, in 1942 I have a schedule here which shows that the Western Pacific Railroad Corporation—it appears in the returns that there was interest on advances to the Western Pacific Railroad Company, interest advances to the Western Pacific Railroad Company, due the Western Pacific Railroad Corporation, of \$274,733.10. The debtor company there was the Western Pacific Railroad Company. The creditor company was the Western Pacific Railroad Corporation. In preparing these returns the debtor company eliminated this deduction through what is known as schedule M, which on the tax return is a schedule which reconciles net income as shown by the return with a net income for the books.

Q. May I interrupt, Mr. Buchanan? You stated just now the debtor company in preparing this return. It is not your intent, of course, to give any testimony as to who prepared these returns or anything of that sort? You did not have that in mind?

A. No.

Q. What you did have in mind was it appears on the face of the returns that those things are so?

A. That is correct.

On the face of the returns it appears that the debtor company had deducted the interest, but that

(Testimony of Robert Buchanan.)

the creditor company had not taken it up as income. So in order to check that out, [681] and just see why that was, and to see the disparity had been corrected in the returns, so I wouldn't have to give effect to it in these computations, I made up the schedules to reconcile the fact that the debtor corporation—for example, in this example the Western Pacific Railroad Company—why it deducted \$274,000 of interest due the parent company and the parent company had not taken it up as income. It was necessary to work this reconciliation out to make sure that it had been eliminated in these consolidated returns, and therefore it did not need to be adjusted in these computations, and those schedules that I have prepared here in detail show the mechanics by which they made this elimination, so it was not necessary to make any adjustment in these computations. It was by means of this schedule M attached to the returns, and on the other side the creditor corporation made the adjustment in the eliminations on the balance sheet; in other words, the creditor corporation eliminated the payable of the debtor company through the consolidated balance sheet, on which the amount due the affiliated companies was eliminated, and it is shown as an amount greater than due from the affiliated companies. So by that mechanics these adjustments that otherwise would have to be made, that is, the difference between the debtor corporation deducting the interest and the creditor

(Testimony of Robert Buchanan.)

corporation failing to take it up, was not necessary to be made. So I would answer your question that since that was eliminated in the consolidated returns, I did not [682] in making these computations, make any change in the final figures found in the consolidated return.

Q. In other words, you concluded that in calculating the tax liability of the Western Pacific Railroad Company on a separate return basis, you did not consider it necessary to restore the interest accrued on the books as a deduction?

A. That is correct, because the company itself had eliminated it in these consolidated returns.

Q. Of course, it is unnecessarily a part of consolidated return accounting to eliminate inter-company transactions; that is correct, is it not?

A. That is correct.

Q. Mr. Buchanan, are you familiar with the rulings of the Treasury Department generally to the effect that while these railroads were in reorganization their tax returns would take into account the old debt structure until reorganization was completed?

A. I think that is a legal question, Mr. Adams, that I would not——

Q. I was asking you if you were familiar with it.

A. In what respect?

Q. Did you know about that?

A. Would you repeat that question?

(Question read.)

A. No, I am not familiar with that. [683]

(Testimony of Robert Buchanan.)

The Court: If separate returns had been filed in the first instance, would the net income have been shown differently than it was in this consolidated return?

A. No.

Q. You said a moment ago that these credits and debits between the companies you took just from the income as shown in the consolidated returns? A. Yes.

Q. Suppose they had filed separate returns; would your calculation of that income have been just the same?

A. I think it would because the omission of the income from the income of the parent corporation might well have been—that income might well have been omitted on the ground it was not collectible.

Q. (By Mr. Adams): What about the debtor corporation, the one that had the interest to pay?

A. That might have been affected by the fact that it was in reorganization.

Q. And so to a measure, Mr. Buchanan, it might be affected by the Treasury rulings that I have just referred to?

A. That is possible.

Q. You do not know about that?

A. I am not familiar with that phase. [684]

* * *

Q. (By Mr. Adams): Mr. Buchanan, referring to your Basis 1 computations, did you make any allowance for net operating loss carry-overs of any

(Testimony of Robert Buchanan.)

of these companies? A. Not in Basis 1.

Q. You made no such allowance for net operating loss carry-overs for the years prior to 1942?

A. That is correct; I did not on Basis 1.

Q. On Basis 1? A. But on Basis 2 I did.

Q. Yes. Now, speaking of Basis 1, I take it neither did you make any allowance for net operating loss carry-overs from year to year within the period covered by Basis 1?

A. That is correct.

Q. Now, still referring to Basis 1, did you make any allowance for carry-overs of unused excess profits credits? A. No.

Q. Neither for the years prior to 1942?

A. That is correct.

Q. And similarly, you did not make any such allowance for carry-overs of unused profits credits from year to year within the period covered by the Basis 1? [685] A. That is correct.

Q. Now, in your computations on Basis 1, did you give any effect to any deductions which might have been claimed by the Western Pacific Railroad Company on account of a partial write-down of advances and loans made to the Sacramento Northern Railway? A. No.

Q. Now, if a deduction of that sort—that is to say, a deduction on account of a partial write-down of the value of such advances to the Sacramento Northern Railway—had been claimed in 1943, and if it had been allowed by the Treasury Department,

(Testimony of Robert Buchanan.)

would that bring about a difference in the computations of tax liability from those which you have made in your Basis 1?

A. I would have to investigate what the basis was of the assets which you say might have been written down. Not having that information, I don't recall that that information appears in the returns.

Q. Let me put the question this way: If the Treasury Department had allowed in a separate return for the year 1943 a deduction for a partial bad debt loss on account of the Sacramento Northern Railway's indebtedness, in an amount, say, of \$8,500,000, would that affect the computations which you have made in your Basis 1?

Mr. Phleger: Just a moment. I don't want to interfere with this cross-examination, but this question is simply, "If [686] deductions had been claimed which were not claimed, and had they been allowed, would it have reduced the taxes?" Well, obviously it would; and I don't see what is gained by asking this witness if it would. We will stipulate that if they had had these losses, which were in fact claimed, and that if they had been allowed, there would have been less taxes. But they weren't claimed, they weren't allowed, and these are the taxes which are shown by this computation to have been payable had separate returns been filed.

The Court: Mr. Adams, may I ask you something so that I may understand this question? Is it going

(Testimony of Robert Buchanan.)

to be your contention that had a separate return been filed for the company, there were other deductions which could have been made, but which were not made because this loss was so large that they didn't even make any other?

Mr. Adams: That is just about right, your Honor. I think I could say "Yes" to that without any qualification, but I would like to add one further item to that, referring to this particular deduction: that is, the deduction for a partial bad debt loss. Such a deduction was not available under the laws and regulations, if you filed consolidated returns. It was available, it will be part of our case to show when we get to our defenses, that it was available if you filed a separate return.

The Court: Well, of course, this witness has only testified to the fact that he had taken the data that he found on the [687] consolidated return, and using the information there as to income, he has calculated that, absent the deduction for the stock loss, what the tax would have been.

Mr. Adams: Yes, your Honor.

The Court: That is the extent of this witness' testimony.

Mr. Adams: And he has testified that the sole source, the sole basis, for his computations was the figures that were shown in the consolidated returns as filed.

Q. (By Mr. Adams): Is that correct?

A. That is correct. [688]

(Testimony of Robert Buchanan.)

Mr. Adams: Now, I have two or three other questions. Perhaps it will be self-evident, but if I may have your Honor's patience I will go through with that.

Q. Mr. Buchanan, if the income for the year 1943 of the Western Pacific Railroad Company were to be adjusted by deduction for cut-backs in refunds to the United States government of, say, a million and a half dollars in that year, I take it that such an adjustment would materially reduce the computations of tax liability that you have paid?

A. Yes.

Q. And you yourself——

Mr. Phleger: May I again point out the witness has stated what he did. Now, these are hypothetical questions that if they had done something which they did not do, would the tax be less. If their income was less, would the tax have been less. Of course it would have been. That is not what he testified to.

The Court: Mr. Adams has stated he has two or three questions he wants to ask along that line. It is obvious what the answer is, but you may ask the question.

Mr. Adams: I think so, but of course, the same thing would be true for the years 1942 and for the first four months of 1944?

The Witness: That is correct.

Q. (By Mr. Adams): And it is likewise the fact, is it not, Mr. Buchanan, that if in the years

(Testimony of Robert Buchanan.)

1942, 1943 and the first four months of 1944 a different treatment had been given to accelerate an amortization of the emergency facilities, then different results would flow from what are shown on your Basis 1 statement?

A. That is correct.

Q. And you have made no calculation of that sort?

A. I have made a computation to see about what that difference would be.

Q. You have? A. Yes.

Q. Will you please state what it is?

Mr. Phleger: I point out that this is not cross-examination. If he wants to ask this witness the questions as his witness, it is all right with us.

Mr. Adams: I think it is cross-examination upon the scope and limitations of his own work. That is the object of these questions.

The Court: I do not pay much attention to whether the facts are listed on the cross-examination or direct examination any more, anyhow. You mean the old rule that you are bound by the testimony of the witness?

Mr. Phleger: Right.

Q. (By Mr. Adams): Do you have the question in mind? A. Yes, I have.

Q. Go right ahead.

A. According to my computations—first let me say that these computations are based upon the principle of accelerating the [690] amortization,

(Testimony of Robert Buchanan.)

that is, shortening the amortization, which you are permitted to do under the law, due to the earlier termination of the war. You see, the amortization originally was figured on a six-year basis and then the war ended sooner than that time and we were permitted to shorten the amortization, and according to my computations, in 1942 that would have reduced the tax dollars \$47,000; in 1943, \$165,000; and in 1944, \$482,000 in round figures.

Q. (By Mr. Phleger): You mean for the four months' period in 1942? A. Yes.

Mr. Adams: You have made the computations that you have just described on the assumption that the election was not taken to accelerate the amortization of the emergency facilities?

A. That is correct.

Q. Whereas under the consolidated returns as filed, is it the fact that, according to your understanding, the election was exercised to take advantage of the privilege of accelerating the mortization of those facilities? A. No, it would not.

Q. Oh, it was the other way around?

A. It was the other way around.

Q. In other words, this additional increase that you have just given us are predicated on the hypothesis that the election was exercised to accelerate?

A. No, it was not exercised.

Q. The election was exercised to allow it over the five-year period?

A. To allow it over the five-year period.

(Testimony of Robert Buchanan.)

Q. And that would have the tendency, as you compute it, to reduce the figures shown upon your Basis 1?

A. No, the other way around. In other words, if they had elected to shorten the amortization period, that would have increased their deduction and that, of course, would have reduced the tax shown here.

Q. The figures you have given me for these three years are deductions upon your figures shown on that basis 1? A. That is right.

Q. That would have been occasioned had they elected to accelerate? A. That's right.

Q. Mr. Buchanan, have you heard about the pending litigation between the government and the Class I carriers where the government seeks by way of reparations to recover portions of the war income of the railroads?

A. Have I heard anything about it?

Q. Yes.

A. Only what I read in the newspapers.

Q. And, I take it, your figures on Basis 1, Basis 2 and Basis 3 take no account of any possible recovery against the Western Pacific in such litigation? [692] A. That is correct.

Q. But may I direct your attention to the column for the year 1942 in your Basis 1, and referring to that, and particularly to the figures entered in that column, the Western Pacific Railroad, would you state what amount of taxable net income you used in computing the taxes entered there?

A. Yes. You are asking now for the year 1942?

(Testimony of Robert Buchanan.)

Q. Right.

A. Taxable net income as shown in the consolidated return for 1942 of \$10,806,257.38, increased by the operating loss carry-over for 1940, which was shown in the return as \$438,280.24, which increased the income by that amount to \$11,244,537.62. You see, the Basis 1 is computed without any carry-over, so we added back carry-over that had been taken in the return itself.

Q. So the income figure that you used as Basis 1 in the year 1942 for the Western Pacific was made by adding to the income reported for the company in that return the carry-over of net operating loss for 1940 of \$438,000?

A. That is right.

Q. Did you follow this same operation as far as the figures for 1943 and the first four months of 1944 are concerned?

A. Yes, sir.

Q. Returning still to the year 1942 and the railroad company's figures, what was the amount of the excess profits net income which you used in your calculations? [693]

A. Going back to that figure that I gave you a little while ago as to the income of \$11,244,537.662, that is the normal tax net income. I added to that 50% of the interest or borrowed capital in the amount of \$1,361,259.44 and deducted a dividends received credit of \$30, bringing the excess profits net income to \$12,603,767.06. Does that answer your question?

Q. You understand that it does, do you not?

(Testimony of Robert Buchanan.)

The question was, What was the amount of the excess profits net income which you used in your computations?

A. Finally it comes down to \$12,605,767.06.

Q. What was the amount of the excess profits credit which you used in computing the excess profits tax of the Western Pacific Railroad Company for the year 1942?

A. A specific exemption of \$5,000 and an excess profits credit based on invested capital of \$6,781,515.17.

Q. You state that last figure was based on invested capital?

A. Invested capital.

Q. Where did you obtain the figure of invested capital upon which you based that amount?

A. From the return, that is shown in Schedule C, taxed to the excess profits tax return, consolidated return, for the calendar year 1942, and that is the schedule that shows the equity invested capital and the borrowed invested capital of all of the companies, and in the column for Western Pacific Railroad Company, starting out with an equity invested capital of [694] \$75,800,000 and an average borrowed capital of \$73,597,000, the schedule in line 36 finally arrives at \$110,525,252.87. [694A]

And to that figure we apply the rates then in effect, of 8 per cent on the first 5,000,000, which is \$400,000. 7 per cent on the next 5,000,000 is \$350,000, and 6 per cent on the balance of \$100,525,250.87—6 per cent of that is \$6,031,515.17, or a total of \$6,781,515.17.

(Testimony of Robert Buchanan.)

Q. Thank you. Now, in your figures for the year 1942 for the Western Pacific Railroad Company, did you include as a deduction in the computation of its tax on a separate return basis any interest on the bonds of that company then held by the parent corporation?

A. You mean the inter-company interest, I take it?

Q. Well, I think that is a fair description. These were bonds of the railroad company held by the plaintiff corporation.

A. Yes, these are bonds—that is the interest on bonds of the Western Pacific Company, held by the Western Pacific Railroad Corporation. It was an item of \$525,784.44. No, that was eliminated in the schedule M before they got to the schedule which shows the income of the individual companies, and I did not take that as a deduction. As a matter of fact, I did make a computation taking that as a deduction.

Q. Would you please give us that.

A. Beg pardon?

Q. Please go ahead and give us that. I take it what you are speaking of now is the computation of the amount your own figures would be reduced by taking that into account? [695]

A. Yes, and also having the creditor corporation taking up a similar amount of income. And I did that for all of the companies for all of the years, 1942, 1943 and 1944, and calculated that the

(Testimony of Robert Buchanan.)

tax would have been, on that basis, \$88,000 greater. So in consultation with counsel, they suggested that we eliminate the inter-company interest.

Q. What would have happened, Mr. Buchanan, to the tax computation as to the Western Pacific Railroad Company, if you had taken into its accounts in the year 1942 a deduction for some \$525,000 of bond interest?

A. It would have decreased the excess profits tax, but would have increased the income tax, and the net difference would have been \$31,995.24.

Q. Do you have a schedule which gives the details of those computations? A. Yes, I do.

Q. Might I ask that this particular schedule be produced, or that we be provided with a copy of that schedule?

A. Yes, I have all the details on those calculations.

Q. Now, is it invariably the rule of the Treasury Department that if a debtor company accruing interest takes the accrued interest as a deduction, that the creditor company, which doesn't receive interest in fact, is required to take the item in as income? A. Yes. [696]

Q. You understand it to be the invariable rule?

A. That is the general rule; now, whether it is the invariable rule, whether there might in some instances, isolated instances, be an exception to that rule, I don't know.

Q. You are not familiar with that?

(Testimony of Robert Buchanan.)

A. No.

Q. Now, I would like to ask you a question or so on the Sacramento Northern Railway computations, which you have made for the year 1942. Excuse me. Before I go to that, may I ask if you will give me a description of the particular schedule that we were just speaking of, under which you computed varying tax consequences resulting from various treatment in these inter-company interest accounts, so that we can have it marked for identification? You have some particular papers that contain those computations?

A. Yes. In fact, all of these computations start with the income shown in the return, and then it shows the adjustments for the inter-company interest, so all of these major schedules, income schedules, show these adjustments. To give you an example——

Q. You don't have any particular computation which brings about this eighty-odd thousand dollar figure we were speaking of a moment ago?

A. Yes, they are all in this set of working papers here (indicating). [697]

Q. Well, you say they are all in there; but do you have a particular paper that has that computation?

A. I would have to go through each one and show the adjustment by years. In other words, we made them separately for each year.

Q. Very well, then.

(Testimony of Robert Buchanan.)

Q. (By Mr. Adams): Now, then, Mr. Buchanan, directing your attention to the item as to the Sacramento Northern Railway for the year 1942, the income tax of \$127,527.71 for that year, would you please state what was the amount of the taxable net income of the Sacramento Northern Railway for 1942 that you used in Basis 1 computations?

A. Yes, I have that right here.

The Court: Now, is there a substantial difference, Mr. Adams, between the amount that is covered by this witness' testimony and the amount you have in mind would be shown by testimony if other deductions were taken, other than the stock loss?

Mr. Adams: Yes, there is a very substantial variance, [698] your Honor, and those——

The Court: Well, what do you mean by that?

Mr. Adams: Let me see if I can call them off generally from memory.

The Court: No, I didn't want to know in detail concerning it. I mean, is it your contention it would be only half as great, a quarter as great, 75 per cent as great, or what?

Mr. Adams: I think if you take all of our figures at 100 per cent value, and of course when we present them and defend them, we do so from that standpoint, then it would appear that upon a separate return basis, consistently carried through—and I mean beginning back before the year 1942, because it makes a good deal of difference whether you did it before then or not—and taking into account this

(Testimony of Robert Buchanan.)

Sacramento Northern loss and cut-backs and reparations figures, that we would come out with a figure that was somewhere in the neighborhood of about, oh, four and three-quarters million dollars taxes for that period. When in fact, \$4,200,000 was actually paid.

So that is perhaps a long-winded way of saying we come out with only about half a million dollars.

Now, I will be frank to say that that includes computations on account of one very large potential that cannot be satisfactorily reduced to figures, and that is this reparations suit. If the reparations suit, which is a very real potential, but is yet not susceptible of exact measurement, is left out [699] of our calculations, then our calculations would show something like \$7,000,000 tax liability on a separate return basis during those years, leaving in comparison to the figures given here of fifteen and twenty-one.

Mr. Phleger: I take it your Honor understands that the Sacramento Northern loss is what would have happened had they sold the railroad that they still owned, and haven't sold; and the loss on which they didn't take in the last eight months of '44, when they in fact paid several millions in taxes; and it is also my understanding of the tax law that when you accrue as income amounts which are subsequently not paid and you were on an accrual basis, your remedy is to charge those off as losses when the loss is ascertained. So that the result of

(Testimony of Robert Buchanan.)

these reparation claims are that if, as and when—which we hope never will happen—the \$3,000,000 lawsuit is determined adversely to the railroad companies, the railroad companies will then be in a position to charge off in that year the amounts which they have theretofore accrued as income and paid income tax on. That is the penalty of keeping your books on an accrual basis.

Mr. Adams: Your Honor, this is way ahead of us. We haven't even put that case in.

The Court: Yes. All I wanted——

Mr. Adams: I didn't want to let Mr. Phleger's statement go back with just a general caveat that we haven't presented [700] the Sacramento Northern loss; it is not as he defines it.

The Court: I just wanted to find out how important this stock loss was, whether or not the railroad company could escape without any taxes without filing the affiliated return. But it is obvious from what you say that they would have had to pay, even assuming you could establish all the deductions, the \$7,000,000 anyhow. I just wanted to get the general picture of that.

Mr. Adams: Yes, your Honor.

Q. Now, I was taking up with Mr. Buchanan this figure for the Sacramento Northern Railway, and I asked what was the amount of the taxable net income that you used in computing the \$127,000 income tax for '42.

A. It was the amount shown in the consolidated return for 1942.

(Testimony of Robert Buchanan.)

Q. And what was that?

A. Of \$7,424.36, plus a net operating loss carried over from 1940 of \$311,394.91, or a total of \$318,819.27, which, at 40 per cent, gives \$127,527.71, found in the column under the year 1942, in Basis 1.

Q. So that this computation, then, is arrived at by adding to the \$7,000 income shown in consolidated returns an amount described as net operating loss carry-over?

A. That's right.

Q. Now, is it the fact, Mr. Buchanan, also with reference to [701] this Sacramento Northern Railway tax computation, that you have not taken into account the interest accrued on any of the indebtedness in the Sacramento Northern?

A. That is correct. There is \$801,000 of that inter-company interest that is eliminated in the consolidated return, which we didn't take up. Although we have a basis for showing its effect when it was taken up as a deduction previously, which computation I previously referred to. [701A]

Q. You are addressing yourself now to your general statement that you worked this thing out all across the board and disappeared, it balances out or almost substantially so?

A. That's right.

Q. But however, that is not to say that in this particular instance of which we are speaking, there was some eight hundred odd thousand dollars deductions of the Sacramento Northern that you haven't taken into account in making that?

A. Oh, on that computation, right.

(Testimony of Robert Buchanan.)

Q. Right. And now referring to the column for the year 1943, our Basis 1, would you say that the computation——

A. For which company?

Q. For the Western Pacific and the Sacramento Northern. Those are the ones we have been speaking of, I take it? A. Yes.

Q. Referring to that column, would you say that your computations for '43 were similar to those which you have just described in the case of '42 for those two companies? A. Yes.

Q. Now referring to the third column, on the Basis 1, a period from January 1 to April 30, 1944, you note in the Western Pacific Railroad Company column you have a figure of \$1,295,616.56 for excess profits tax of the railroad company for that four months' period? A. Yes. [702]

Q. Did you calculate that tax solely upon the income figure of \$2,975,142.13, that you referred to in your testimony this morning?

A. Let me give you the detail of that.

Q. Perhaps you might say "no" if that question is not correct.

A. I would have to look up the computations to refresh my mind.

Q. Surely.

A. Now that computation, the net income for declared value excess profits taxes is \$2,975,142.13. And then there is added to that 50% of the interest on borrowed capital, \$454,447.27, making a total of

(Testimony of Robert Buchanan.)

\$3,429,589.40 from which there is deducted a figure dividend received credit of \$30, coming down to \$3,429,559.40; and from that is deducted a specific exemption prorated of 4/12 of a year, \$5,000 for 4/12 of a year, which figures to \$1,666.67, and the excess profits credit is also prorated for 4/12 of a year, arriving at the amount of \$1,912,551.73, giving a total excess profits credit of \$1,914,218.40, which leaves as subject to excess profits tax, \$1,515,341.00, and the tax is 95% of that amount, or \$1,439,573.95. From that is deducted the post-war refund of 10% thereof, or \$143,957.49, coming down to a tax, an excess profits tax, of \$1,295,616.56, which is the figure about which you are asking.

Q. Yes. Now from what source did you derive the excess profits credit figure which you then prorated by taking a third of it? [703]

A. That is that same figure that I gave you a little while ago, taken from the return here, as the \$110,000,000 figure. No, let's see. That is—let me make sure of this. This is the 1944?

Q. Yes.

A. That is taken from the return itself, showing an equity invested capital—do you want me to read all the details?

Q. I asked you the source of the excess profits credit figure that you used in the computation.

A. The source of the returns which show money paid in for stock of \$800,000, property paid in for stock, \$75,000,000, or a total of \$75,800,000. This is

(Testimony of Robert Buchanan.)

the Western Pacific. And borrowed capital of \$73,000,000, half of which is thirty-six million odd. That gives one hundred twelve. And then there is an adjustment of inadmissible assets of \$2,000,000, bringing the invested capital to \$110,753,104.08, which is approximately the same as we have here for 1942, and to that invested capital figure is applied the percentage rates, coming to an excess profits credit of \$5,737,655.20, and then the credit is prorated, 4/12 of that amount resulting in this prorated credit of \$1,912,551.73. [704]

* * *

Q. Now, Mr. Buchanan, directing your attention to your schedule, Basis 2, I take it what you told me with reference to Basis 1, as far as the possible deductions I have mentioned are concerned, that is, the Sacramento Northern partial bad debt loss and the accelerated amortization and the cut-backs and refunds and the reparations claimed, I take it that no account of those matters is taken in your figures on Basis 27. A. That is correct.

Q. Now, in Basis 2, you say, among other things, in your title "Giving each affiliate the benefit of any operating loss carry-over or unused excess profits credit carry-over attributable to it," and I would like you to explain, if you will, just what process you followed in giving those benefits in your computations, Basis 2. [705]

A. Yes. You will notice that the difference between Basis 1 and Basis 2 is that in Basis 1 we

(Testimony of Robert Buchanan.)

have an excess profits tax of \$4,713,594.03, whereas in Basis No. 2 we have no excess profits tax. Now, explain that difference where you start with the net income shown as a return, the same as used in Basis 1, \$10,806,257.38, and we add back to that what was added back in the return, the operating loss of \$438,280.24, and the 50% of interest on borrowed capital of \$1,298,956.10. And I might say in passing that adding back the \$438,280.24, that is the entire net operating loss, whereas that should have been the net operating loss deduction, which is really the operating loss less certain adjustments for non-taxable income, dividends, and capital gains. But we put that figure in because that is the figure used in the return, and it would not materially affect the results because of the very large credit that we come up with in 1942. But I just want to point out that fact. That gives us an excess profits net income of \$12,543,493.72. The entire excess profits tax is wiped out because we have the current credit, that is, the excess profits credit for the year 1942 of \$6,781,515.17, and then we have a carry-over from 1940, unused excess profits credit of \$7,725,229.71 and an unused excess profits tax credit carry-over from 1941 of \$7,633,732.80, or a total carry-over for those two years of \$15,356,962.51. The unused excess profits carry-overs for the years 1940 and 1941, added to the current year's credit, gives a total credit of \$22,138,477.68 applied to the excess profits net income of \$12,542,463.72 and,

(Testimony of Robert Buchanan.)

of course, the excess profits tax is wiped out and is zero, as is shown in column 1 of Basis 2. So the principal difference between Basis 1 and Basis 2 is the result of these carry-overs.

Q. Let me ask you one or two questions about Basis 3. Is it correct to say that your computation on Basis 3 is made by using the data in the consolidated returns as filed without any change or adjustment except elimination of the corporation's stock loss? A. That is correct.

Q. So that in effect this computation is a computation of what the consolidated tax returns would have shown as taxable income if the loss had not been taken as a deduction in those returns?

A. That is correct.

Q. And I take it, as in the case of Bases 1 and 2, you have not taken into consideration the adjustments for accelerated amortization or for cut-backs, refunds or for the reparations claim in those computations? A. That is correct.

Q. Just one more question about the figure in the column Basis 3 for the period January 1 to April 30, 1944. I notice that there is a note there "Corporation's excess profits credit for 1944 prorated." A. That is right.

Q. Correct me if I am wrong about this, but I will try to state [707] what I understand the return shows in this regard. The return shows the parent corporation's excess profits for the last twelve months, does it not?

(Testimony of Robert Buchanan.)

A. That is correct.

Q. And that excess profits credit is a figure entering into the computation of tax liability?

A. That is right.

Q. And to reduce it to $\frac{1}{3}$ of that figure would increase the resulting tax liability?

A. That is right.

Q. Is it not the fact that the return as filed by the parent corporation under the law covered the whole year for the parent corporation?

A. Yes, but all the subsidiaries were in there only for four months.

Q. The subsidiaries were in there only for four months? A. And if it were deemed——

Q. Did the law require that in the computation of tax liability under the return to parent's excess profits credit be cut $\frac{2}{3}$, as you understood?

A. As far as I could find, the law is silent on that point, and under the consolidated income tax regulation, since the subsidiaries had all gone out of the picture, that was the reason for our prorating it. In other words, it might well be put that the treasury department would say that it had to be prorated for [708] that reason. That was our reasoning.

Q. Are you satisfied in your mind whether or not the Treasury Department would have made that requirement?

A. I don't know. It seemed to me that might well have been required for that reason. I looked up

(Testimony of Robert Buchanan.)

some regulations; I couldn't find any ruling on the subject.

Q. Have you made any computation covering that four months' period of what the figures entered in your Basis 3 item would have been if you had taken the full amount of the twelve months' excess profits credit?

A. No, I have not. [709]

* * *

Mr. Phleger: This morning, in connection with Plaintiff's Exhibit 73, which you recall were six sheets representing an income tax computation prepared by one Reilly, I asked counsel to stipulate who Reilly was, but I think I forgot to ask him to stipulate that those sheets were prepared by Reilly. Will you so stipulate?

Mr. Adams: I think that is what the record shows.

Mr. Clark: That is right.

Mr. Phleger: That is not my recollection. We identified Reilly but we did not have a stipulation that Reilly prepared them, which he in fact did, as shown by the deposition.

Mr. Clark: May we have the stipulation now?

Mr. Adams: Oh, yes. I think the record shows that. If it does not, I so stipulate.

Mr. Phleger: If it please the Court, this terminates the presentation of our case in chief. I will conclude by offering Plaintiff's Exhibit 1 for iden-

tification, the chart showing corporate relationships. [711]

* * *

Mr. Adams: I am just making an objection to a chart that I do not think is fairly representative of the evidence.

The Court: This has nothing to do with what your contentions are in the case. Your opponent is merely offering the chart as a summary of what he says his witnesses have already testified to and what the record he has already introduced shows. It is not offered for any more than a summary of the evidence he has presented. It does not prove anything in the case. The chart does not prove anything.

Mr. Adams: May I respond to his Honor, because I think his Honor's request was directed to me. I would have no objection to the production of this paper if all that were sought to be accomplished by it is the same thing that is accomplished by a brief. I do not understand how it can be that something that purports to be in effect a brief on the part of one party to the litigation can be admitted in evidence as evidence or proof of any fact.

The Court: We admit all sorts of things for limited purposes in evidence, and that takes care of that matter, and if this is admitted only as a summary of what has already been testified to, if there isn't any testimony to state it, the chart does not mean anything. It has that limitation to it when it is admitted. [713]

Mr. Adams: Well, in other words, as I understand your Honor, then, admission of this chart in evidence does not tend to prove anything that is not otherwise proved for the record.

The Court: Of course. I have said that several times. I think that is all any chart is admissible for.

Mr. Adams: Then in that case, I confess that I don't have a very good ground for objection to its admission in evidence.

The Court: I think these charts may be admitted as charts, as summaries of the testimony already in evidence, and not in proof of any fact thereon stated—unless there is evidence to show the things that are set forth in the chart.

Mr. MacKinnon: May I inquire whether there is any evidence to support the stock holdings indicated on the chart of Sacramento Northern, Deep Creek, Standard Realty and Tidewater Southern, at the present time?

Mr. Phleger: Yes, in the income tax report of the Western Pacific for the last eight months of 1944; also in the annual reports of the Western Pacific Railroad for 1944, '45, '46 and '47.

The Court: Well, if there is any inaccuracy in these charts, why, you can treat them in effect as if they are brief presentations of the evidence.

Mr. Phleger: Now, I take it that covers——

The Court: How many charts have you got there?

Mr. Phleger: Plaintiff's 1, which is the corporate [714] relationship. Plaintiff's 2, being the positions held by the officers, and I will offer the chronology as 2-B.

The Court: Very well, they will be admitted for the purposes and on the basis of the Court's statement.

(Plaintiff's Exhibts 1 and 2 for Identification were received in evidence; chronology chart referred to was received in evidence and marked Plaintiff's Exhibit 2-B.) [715]

* * *

(The Plaintiff rested.)

Mr. Clark: May it please your Honor, on behalf of the interveners, I will ask all counsel in the case for a stipulation that the intervener, Henry Offerman, now owns 4080 shares of preferred stock of the plaintiff corporation, and has been a stockholder of the plaintiff since July 7, 1942; that the intervener J. S. Farlee & Co., Inc., is the owner of 10,000 shares of the plaintiff corporation and has been a stockholder since January 10, 1944; and that Meredith H. Metzger, formerly [716] Meredith H. Van Kirk, who was substituted for her deceased husband by order of this Court on January 28, 1949, is the owner of 11,385 shares of the plaintiff corporation, 8200 shares of which were distributed to her from the estate of her deceased husband; and that he had been a stockholder of the plaintiff corporation since February 23, 1944.

Is it so stipulated, gentlemen?

Mr. Adams: I would like to respond to that very briefly, Mr. Clark. In the first place, I told Mr. Clark, and I will stipulate to the fact upon his assurance that it is so,—which he gives me—that whatever stock ownerships were developed at the time the depositions were taken, and those related to Mr. Offerman and Mr. VanKirk and the J. S. Farlee & Co., are still existent. This is probably just what Mr. Clark has said.

Now, with regard to Meredith H. Metzger, Mr. Van Kirk's widow, we agreed also that she might be substituted in the case subject to the same defenses and disabilities that her husband might have had. So when Mr. Clark refers to the fact that she also comes individually as a stockholder in her own right to some small number of shares, I wish it to be understood I haven't agreed she might come in the case late not subject to those disabilities and defenses. With that statement, I take it that what Mr. Clark has said is substantially what I have said. [717]

Mr. Clark: Well, may it please your Honor, of course the Metzger substitution is covered by a written stipulation, and a court order which was made pursuant to a stipulation signed by all the parties. Now, as to the amounts I read, they are slightly larger than the amounts developed on deposition, due to the fact that in the meantime, some treasury stock of this plaintiff corporation was offered to the stockholders, and these people have taken their pro rata shares of that offering.

The figures are substantially above those developed on deposition, in that Offerman was shown to have held some 3090 shares, and the figure I gave was 4080 shares.

With that one point, pointing that one thing out to the Court, my statement is substantially in accord with that made by Mr. Adams, which was agreed to on pre-trial, with the exception of the small additions.

Mr. Adams: As to the small additions, your Honor, I take it that Mr. Clark is not insisting that because of these additions, his clients have any better position.

Mr. Clark: No, I am simply trying to give the correct amounts.

Mr. Adams: And further, that the prices paid for those small additions may be stated as they have been, with respect to the other stock; if you have the prices, I would be grateful if you would state them, and we will accept your statement.

Mr. Clark: I don't know the price for that. [718]

* * *

(Letters previously identified as Interveners' 67-A, -B [721] and -C, dated February 11, 1947, referred to above, were received in evidence and marked Interveners' Exhibit 14.)

Mr. Clark: And the record, of course, shows that the plaintiff corporation received no notice of any such offer of settlement until the following April. [722]

* * *

Mr. Levy: I should like to read into evidence certain portions of the deposition of Mr. Robert E. Coulson taken in New York; first from page 5702:

“Q. Mr. Coulson, you are a member of the bar of the State of New York? A. Yes.

Q. And a member of the firm of Whitman, Ransom, Coulson & Goetz? A. Yes.

Q. Are you the Mr. Coulson of the firm name? A. Yes.”

Page 5704:

“Q. When did you first become affiliated with the firm of Whitman, Ransom, Coulson & Goetz, as it was then known? A. January 2, 1919.

Q. Have you continued with that firm since to date? A. Yes.”

5709:

“Q. In the course of your activities for the firm of Whitman, Ransom, Coulson & Goetz did you engage in legal services for Arthur Curtis James during his lifetime? A. Yes.

Q. Can you give us a brief picture of the nature of the [723] services that you performed upon his behalf?

Mr. Levy: Generally.

Q. The answer can be general as well.

A. Generally I acted as counsel for him in many of the matters which arose in New York.

Q. Did those matters involve tax work?

A. Yes.

Q. Did they involve corporate work?

A. Some of them involved corporate work.

Q. Did they involve legal advice in connection with business dealings, that is, the acquisition of property or the sale of property? A. Yes.

Q. Would you say that a considerable part of your activities on behalf of Mr. James were in the tax field during his lifetime?

A. A substantial part was, especially in the early years, Mr. Levy.

Q. During your activities with the firm of Whitman, Ransom, Coulson & Goetz did you perform legal services for the various James companies?

A. Yes.

Q. Did those services cover the general field of law practice? A. Yes. [724]

Q. Did they include tax work?

A. Yes, again with a qualification, Mr. Levy. In the early years I dealt with the tax problems personally and in the later years, why, the office, the firm would deal with them and I would know about them.

Q. When did you become a partner in the firm?

A. January 2, 1919.

Q. Have you during any period of your work with the firm been the partner in charge of the legal services rendered by the firm for Mr. James and his companies? A. Yes.

Q. During what period would you say that was true? A. For almost 20 years.

Q. Has it continued to date?

A. Yes, subject to the qualification that Mr. James has no companies at the present time. They have all been dissolved.

Q. Since Mr. James' death have you represented the estate of Mr. Arthur Curtis James?

A. Yes, our firm has represented the estate since his death.

Q. Your firm has also represented the James Foundation during this period? A. Yes.

Q. And you are the partner who was in charge of the [725] work performed for the firm for both of those clients?

A. Yes, for the estate, that would be under the partner who is the head of the probate work, Mr. Chambers.

Q. In connection with handling the estate, are you kept generally familiar with the progress there?

A. Yes.

Q. During the reorganization of the Western Pacific Railroad Company the firm represented the A. C. James Company, did it not?

A. That is correct.

Q. Were you the partner in charge of your firm's activities in that connection? A. Yes.

Q. By the way, we have developed the practice in these proceedings of referring to the railroad company as the company and the railroad corporation as the corporation, so if I say the company I mean the railroad company, and if I say the corporation I mean the railroad corporation.

During the years 1943 and 1944 your firm was likewise tax counsel to the trustees in bankruptcy of the railroad company, were they not?

A. The firm was retained sometime in 1943 to

act for the trustees under Section 77 in the reorganization proceeding." [726]

The next page is 5819:

"Q. I believe you have already testified that from 1943 to date your firm has been counsel to the A. C. James estate, the Foundation, and the A. C. James Company up to the time of the dissolution?

A. Yes.

Q. As counsel for those various clients did your firm do tax work and corporate work?

A. Yes, we were general counsel.

Q. Did you draw the will of Arthur Curtis James?

A. Yes, in the sense that I was the responsible draftsman. Our probate department, of course, worked on it. It was a composite job, both the will and the codicils.

Q. Would it be correct to state that the securities of the railroad company held by the estate and the Foundation were an important asset of the estate and the Foundation?

A. They represented substantial value as well as a much larger investment.

Q. Had you from time to time held a position with any of the James companies other than that of counsel?

A. Yes, I had been for some years a director of the Curtis Southwestern Company and the Curtis Southwestern Corporation and the A. C. James Company. [727]

Q. Had Mr. James requested you to assume

those positions in those companies?

A. Yes."

Page 5718:

"Q. Was the effect of taxes on earnings a vital factor to your clients, the A. C. James Company?

A. Yes, in that they expected to receive securities in the reorganization. The property, you understand, was in the hands of the trustees and in the process of reorganization." [728]

* * *

Mr. Adams: I have not hitherto understood the statements made on behalf of the plaintiff—they were made largely on behalf of the plaintiff—that the defendant took over this tax matter to relate to particular conduct of any particular gentleman who was involved in these transactions. I had understood the plaintiff's case to be a contention that these tax returns were filed by a variety of people—Mr. Curry was one of them, Mr. Schumacher was another, and so on—whom he has up there on his chart, and that the tax returns were advantageous to the defendant, and that all that was intended by a statement that the matter was taken over was, that that was the way it was done, without any implication of any sinister or improper motive, but only that it was done, and the complaint was that the plaintiff had some rights in the matter about which the plaintiff [731] is now in court. Now, do I understand that it is interveners' view that there was any misconduct, improper motive or improper action on the part of any actor in these

proceedings? I would just like to be sure what these charges are that are being brought against us so we may know what it is we have to answer.

Mr. Levy: I think the facts speak for themselves, your Honor.

The Court: I am not too sure about it.

Mr. Levy: I will spell it out a little. I do not want to dodge the question.

The Court: You are suing the railroad company here, aren't you?

Mr. Levy: Yes, we are.

The Court: And it is your contention that the railroad company dominated this tax situation. Is it your contention that the railroad company in turn was dominated by this gentleman, Mr. Coulson?

Mr. Levy: No, we have not made that contention in the course of this trial, your Honor. What we have contended is this: We have contended that through the dual relationships of these officers and directors and through Mr. Coulson's domination of the corporation, the plaintiff in this case, and through his position as tax counsel, wherein he dominated the handling of these tax matters, and through having put Mr. Curry in his own office since May 1, 1945, he did in fact—— [732]

The Court: Mr. Coulson was not a director of the corporation, was he?

Mr. Levy: He was until 1942; but your Honor will recall that the James Foundation owns 40 per cent of the stock of this plaintiff.

The Court: In the period with which we are concerned he was not a director?

Mr. Levy: He was not.

The Court: Nor an officer?

Mr. Levy: He was not, but he was its tax counsel with all these conflicting pulls operating upon him.

The Court: What is it that he did that the defendant did not do that gives you any cause of action that you did not have before?

Mr. Levy: I will put it this way: What the defendant did, it did in part through—for instance, the failure to advise this corporation as these returns were going in of whether or not separate returns could be filed, of whether or not the corporation was assuming liabilities, of whether or not the corporation had another course of conduct which it could have pursued—he did that. He is a member of the firm and he did it, and the testimony will show he actively participated in the various events as they took place.

The Court: Of course, if he did it without the knowledge and consent or against the consent of the plaintiff, then maybe you [733] might have named him as a defendant and charged him with some form of conspiracy and the Court might properly find what he had to do with the matter.

Mr. Levy: He was working for the railroad.

The Court: Is there anything more than that under the circumstances that have been described that, as you have urged heretofore, the defendant

caused the preparation of the returns which the plaintiff signed?

Mr. Levy: Other than this?

The Court: I say, what does this add to it?

Mr. Levy: Well, I think this particular letter, your Honor, adds——

* * *

The Court: What difference does it make what he said to somebody else concerning the matter?

Mr. Levy: That is not the point, your Honor. I think the point is this: The point is to me, Did Mr. Coulson represent both companies and what were his conflicting tugs? That is one of the issues in this case.

The Court: What difference would it make unless the defendant is chargeable with it?

Mr. Levy: Now, I think the defendant is chargeable with it [734] in this sense: Everybody knew who Mr. Coulson represented. That was no secret, your Honor.

Mr. Adams: Certainly there was no secret about that.

Mr. Levy: I am not saying there was anything invidious about his representations, but it is a part of the duality, your Honor.

The Court: Is there any secret about the fact that Coulson had represented these other interests?

Mr. Levy: No.

Mr. MacKinnon: It was spread right out through the reorganization.

Mr. Levy: There was no secret about that. I am not contending there was.

Mr. MacKinnon: This is a little more color, that is all.

Mr. Levy: I do not agree with that. This piece of evidence gives you a piece of evidence that you do not now have in the record. There is nothing in the record that shows that as of that date, and during the period of the reorganization, during this critical period, the James interests had and viewed their standing as being that of a group representing 21 per cent of the stock of this railroad company when it was issued. Now, that is a strong tug for a man who is representing both the railroad company and the corporation in determining where his interests lay, as to who should get any savings that flow from taxes. [735]

The Court: You are not expecting to get me into an evaluation of the tugs that are involved in this case? If that is the case, it would open the door to all sorts of testimony concerning this gentleman, Mr. Coulson, what he thought about it, whom he spoke to, what his views were as to his respective loyalties, duties, and so forth and so on.

Mr. Levy: I am pointing to objective facts, not subjective facts. [736]

* * *

But we do feel that your Honor is absolutely right that on one leg of this case this stuff has very little to do with it. We do feel, though, that there is a second leg of the case, and although your Honor may not give any judgment based upon it, we feel there is a basis for the claim perhaps in an

appellate court, if we ever have to go that far, and they will agree with us on that leg of it. [738]

And along those lines the basis of our claim can be simply stated that over and above what dual relationships produced, which is enough to make the case, if there is unfairness, if there were a conscious using, you have got a different kind of a case with different legal incidents. Now, one of the elements of this conscious using is mode of use to benefit one against the other. [738-A]

The Court: Well, I can follow all that argument or I could if there were some concealment involved. But when everybody was, as they were in this case, acting completely in the open in the matter, nobody was concealing anything from anyone else, the element of fraud or deception, of the kind that you refer to, is absent. So you have to decide the matter then on the basis of whether or not, under those facts and circumstances, there was nothing that was either legally or equitably wrong or disadvantageous to one party or the other, done. You don't enter into these questions of fraudulent overreaching unless you have got some element of concealment involved in the case, and equity; your reading of equity will satisfy you on that, of the principles of equity, and you are not charging or claiming that there was any of that kind of deception in the case. Everybody knew that consolidated returns were being filed. Everybody knew who the directors were. Everyone knew that these attorneys were being employed to file this consolidated return. It was all done right out in the open. The

question that you have to present in this case is, now, can we go back and under principles of equity, redetermine the transaction on the basis that a legal or equitable wrong was done by what was done.

Mr. Levy: Your Honor, that is a very persuasive answer to our contention, and perhaps your Honor is ultimately right. But you say that there is no concealment here, and there is no secrecy. I just want to point out two things to you, without [739] going into the record to give you more. One is, why do tax attorneys who represent two participants in a consolidated return fully advise one and not advise the other at all? That is unnatural; let's at least call it that. Let's go to the settlement in February 11. Let me just pursue that one moment.

The Court: Well, all I have to say to you there, Mr. Levy, is that I don't think it is necessary to carry that argument forward now. Everybody knew, didn't they, that the consolidated return was being filed? So that the defendant railroad company wouldn't have to pay any income tax? That was why it was filed, wasn't it?

Mr. Levy: Yes, your Honor.

The Court: Nothing else is of any importance; that is why it was filed.

Mr. Levy: Yes.

The Court: With that in mind, nobody had to conceal anything from anybody else. That is why they did it. They filed a consolidated return and took this loss so the railroad company wouldn't

have to pay any income tax. They made use of the stock loss of the parent company to avoid paying the income tax. Now that is what they did.

Now under the particular circumstances that we have in this case, you have presented a very unusual, and I think at this point, a difficult question, which involves whether or not there was a cause of action now on the part of the plaintiff [740] because of those circumstances. Now isn't that the case here?

Mr. Levy: That is one leg of it. Undoubtedly——

The Court: Well, if it hasn't got that leg, it hasn't got any leg.

Mr. Levy: Absolutely. That is a very important leg of it, and that may be the only part of the case that your Honor feels he is going to have to decide. But rightly or wrongly, and certainly without any desire to prejudice the plaintiff's case, we think that there is an argument to be made on another leg. Now we may be proceeding mistakenly, and we certainly have tempered our presentation of it in an effort not to take too much time. We have spent an awful lot of time talking about one piece of paper here. [741]

* * *

Mr. Levy: Now I should like to read from Mr. Coulson's deposition, on page 5740: (reading):

“Q. In what capacity did you write the letter of June 26 to Mr. Curry, Interveners' Exhibit 64?

“A. For that, I would like to see the prior letters, Mr. Levy, because it is a continuation of cor-

respondence which apparently started with a letter of April 12, 1943, from me to Mr. Curry, and a letter from Mr. Curry to me of May 15, 1943.”

Whereupon the requested documents were exhibited to the witness. (Continuing):

“Q. Will you answer the question, Mr. Coulson?

“A. That letter was written in the capacity of counsel to the James Foundation of New York, Inc.

“Q. I notice that the last paragraph of Interveners’ Exhibit 64, your letter of June 26 to Mr. Curry, states: ‘Before the Foundation gives a final and definitive answer to your proposal, I would wish to discuss with Mr. Polk the tax aspects of the problem and make that information available to the trustees of the Foundation.’

“Now I show you interveners’ exhibit 60,—”
This is Plaintiff’s 51 in this case.

“—your memorandum of June 26—” [744]

The same date, 1943,

“—to Mr. Polk, and ask you whether that is one of the tax problems taken up with Mr. Polk in connection with your letter of June 26, Interveners’ Exhibit 64.”

“The Witness: This memorandum speaks for itself, being on the same date. I have no recollection independent of the documents here, Mr. Levy. It was a memorandum written to Mr. Polk on the same date as the letter to Mr. Curry, and refers to tax problems which might arise, or tax aspects of the continuation of the corporate charter of the holding company.”

Now, continuing on page 5743: (Reading):

“Q. Can you tell us in what capacity you directed the memorandum of June 26 to Mr. Polk?

“A. Was, to the best of my recollection, as counsel for the James Foundation of New York.

“Q. In your memorandum to Mr. Polk, Interveners’ Exhibit 60,—”

Which is Plaintiff’s 51.

“—you use the following language:

“‘Will it embarrass you in the Western Pacific . . .’

“Was the Western Pacific situation referred to, Mr. Polk’s activity as counsel to the trustees in tax matter? “A. Yes. [745]

“Q. What was the relationship between the Western Pacific tax situation and the Foundation on or about June 26, 1943?

“A. The James Foundation held, directly and indirectly, as creditor, a substantial tentative in the Western Pacific reorganization, and was interested in the ultimate outcome of this reorganization, and hence, interested in anything that benefited the earnings and assets held by the trustees in bankruptcy.”

* * *

The Court: Well, you don’t need the letter in for that; they will stipulate with you on that, won’t they, as to what the percentage was?

Mr. Levy: If they will, I will accept the stipulation, based on Mr. Coulson’s letter, yes.

The Court: If all you want to show is the percentage, subject to its materiality—

Mr. MacKinnon: The plan shows what they got.

There is no secret about that.

Mr. Adams: Yes, there is no secret about that.

Mr. MacKinnon: They got it under the plan of reorganization.

The Court: The figure was correct, was it?

Mr. Adams: Let us see how it is stated here; this may be an abbreviation.

Mr. Levy: 21½% of the voting stock of the reorganized company.

Mr. Adams: I think that is correct. I will stipulate to it.

The Court: You don't need to put the letter in.

Mr. Adams: That is a statement that the James Foundation and the A. C. James Company together came into 21½% of the voting stock of the reorganized company under the provisions of the [748] plan, and the securities they held.

Mr. Levy: I think that says it, your Honor.

The Court: All right. [749]

* * *

Mr. Levy: Will it be conceded that 100% of the stock of the Western Realty has been owned since April 30, 1944, by the James Foundation of New York, Inc.?

Mr. MacKinnon: Subject to correction, yes. The exact dates are the thing in question; if they would be shown to be [752] changed, I will reserve the right to make the change. [753]

* * *

Mr. Levy: I hope I won't take too much more time as a result of precipitating these debates.

On page 6144 (reading):

“Q. Has the retainer arrangement with Mr. Curry been terminated?

“A. No, it has been terminated, but is still in effect. It has been terminated as of the end of the year 1948.

“Q. Did you discuss the termination of that retainer with any representative of the railroad company?

“A. Not to my recollection.” [755]

Mr. Levy: I think I have no more, your Honor. That concludes the reading.

Mr. Clark: The interveners rest, your Honor.

(The interveners rested.)

Mr. MacKinnon: Your Honor, I should like to make a motion at this time to dismiss the complaint in intervention pursuant to Rule 43, I think it is, of the Federal Rules of Civil Practice on the ground that the complaint in intervention has not been established by any evidence adduced, and whatever will meet your Honor's wishes, whether it be done at length, I will comply with.

The Court: Of course, I allowed the intervention.

Mr. MacKinnon: What is that?

The Court: I say the intervention was allowed.

Mr. MacKinnon: I appreciate that. The complaint in intervention is a pretty drastic pleading, and I say on the basis of the proof—and that is what we are dealing with—their complaint, in

which they charge a conspiracy here, I say there is no evidence to sustain a conspiracy. If they want to withdraw and restrict it, we will meet whatever cause of action there is, but as I understand it, they are resting on their complaint, and under the circumstances I do not think they made their case, and since they have not made their case I am prepared to discuss it at length or briefly, whichever your Honor wishes. [756]

The Court: Doesn't the complaint in intervention also adopt the plaintiff's cause of action?

Mr. Clark: It not only adopts it, it injected it into this case for the first time, your Honor. There was not an issue of duality in this case until it was allowed, and that is why it was allowed.

The Court: There was an amended complaint.

Mr. Clark: Yes, months later, which adopted in part the theory of the stockholders' action in New York and also the theory of the complaint in intervention. To answer your Honor's question, yes, the duality is the substance of the complaint in intervention.

Mr. MacKinnon: I do not think it is. I think there is a plan and conspiracy charged in the complaint in intervention, and domination and control is alleged from the beginning to the end. Now, if you want me very briefly to refer to the allegations——

The Court: Of course, there is no conspiracy involved here.

Mr. MacKinnon: Then let us have it on the record. Let us know what we have to meet.

The Court: What you are really interested in is knowing how far the defendant has to go in its proof?

Mr. MacKinnon: That is right. We have to know what we have to meet. That is what we want. I think it is time for [757] interveners to fish or cut bait.

Mr. Clark: That issue, if it please the Court, was defined on pre-trial. I handed up a letter to your Honor. I read it to your Honor, and everyone was advised of the restriction of the allegations which were made at the time of the intervention for purposes of the trial. Mr. MacKinnon had notice of that long before even the pre-trial conference. This complaint in intervention, if it please your Honor, was drawn at a time when the corporation had come out here, a few weeks after a motion to dismiss in the New York action had been denied, which had been interposed by defendants there, at a time, may it please your Honor, when the directors of the plaintiff corporation were named as individual defendants in New York, in the action brought by interveners as plaintiffs, at a time when Mr. Curry was officing in Mr. Coulson's office, Miss Valouch was there, they being president and secretary, and the complaint which the corporation came out here with and then filed did nothing more than to allege the fact that these returns had been filed and the stock loss used. There was not the least suggestion of the capacities under which the people had acted or anything

of that kind, and we came here, may it please your Honor, and Mr. Levy associating my firm for the purpose of intervening in that action, and on the evidence as we then knew it, depositions having been taken in New York, we made the allegation that both the defendant company and the corporation were dominated by the James interests, and we did allege what amounted to a deliberate plan to use these stock losses for the advantage of the defendant company. Now, those allegations were in the complaint. But also in that complaint was injected for the first time in this California litigation the issue of duality, and we detail as much of it, may it please your Honor, as we then knew, such as Curry's conflicting positions and the conflicting positions of Mr. Nicodemus, who was still counsel at that time for the plaintiff corporation. That was the petition of these stockholders at that time when your Honor on that showing, may it please your Honor, allowed us to intervene, and I assume the order allowing the intervention has long ceased to be appealable. That complaint stood all through the following couple of years, a year and a half, while we, the interveners, pressed forward the discovery proceeding and developed all this evidence that has been produced before your Honor, every bit of it, and when we came up to the pre-trial conference counsel asked me informally how much of this domination thing we intended to rely upon, and in my letter to them, which I read to the Court, after my first having

asked them if they intended to insist upon an amended complaint pleading, we specifically say, may it please your Honor, that in addition to the duality, which is the foundation of the complaint in intervention, we intended to rely on the theory which Mr. Levy has described as one leg of the case—and we [759] restricted it to the period commencing January 1, 1943, and later on pre-trial said March 15, 1943—namely, on that leg we describe the domination by the James interests through the activities of Coulson of the plaintiff corporation for the advantage of the railroad company while he, Coulson, was counsel for the railroad company. May it please your Honor, prima facie that showing has been made so far as supporting the allegations in the complaint as abridged by my pre-trial stipulation. There just is no doubt of it, and in addition to that the complaint in intervention proceeds upon the theory of duality. Instead of that being a fit subject at this time, your Honor, for a motion of this kind, I suggest to your Honor that if the complaint in intervention is supported by any of the evidence here, it should be allowed to stand, and at the conclusion of the trial, then if it is necessary we can conform to the proofs, and I think in view of the discussions between the parties before the pre-trial on this very subject, that Mr. MacKinnon's motion at this time is out of order.

Mr. MacKinnon: I do not think it is, your Honor. I think it is right on the nose within Rule

43 of the Federal Rules. They make their case or they don't make it. They have charged a conspiracy here. They have charged domination and control, and their complaint in intervention bristles with it. Now they say, 'if I understand them correctly, "We want to rely on duality but we do not want to take that position on the record." [760] Let them take a position on the record so that we know exactly what we have to meet. That is all I am saying. But they can't both say, "We are relying on a complaint in intervention which charges such matters as those to which reference has been made, and they are going to ask you to draw every inference they can from what I say is a definitely limited record here—definitely limited—this record amplified will explain many of these transactions. They take an isolated document out of its setting. They introduce it. They are going to ask your Honor to draw inferences from it. Are we to be circumscribed? We cannot be circumscribed, unless we know what they are making as their record, if they are standing on domination and control. If they are standing on conspiracy, we will meet it. But on the present state of the record they have not sustained domination and control. They have not sustained conspiracy, and by reason of their failure of proof I do not see any other alternative except to dismiss. If they want to rest on duality, let them say so.

The Court: Isn't there some evidence that supports the argument that there was in a legal sense domination and control?

Mr. MacKinnon: I do not think there is.

The Court: Without having any sinister connotation attached to it or anything that savors of fraud or deception; that by virtue of the facts as they actually occurred, the [761] positions of the parties, their relationship to one another, there was in fact control?

Mr. Clark: That is precisely the point, your Honor.

The Court: It does not necessarily have to be for a sinister purpose. There is nothing wrong about having exercised control.

Mr. MacKinnon: Obviously not.

Mr. Clark: Plus the fact that the case the interveners have made out by the evidence adduced before your Honor—it is not made out by the pleading. It is the case made out by the interveners.

Mr. MacKinnon: Do you want to amend to conform to proof?

Mr. Clark: Just a minute, Mr. MacKinnon. The interveners and plaintiff have made out a case, for what it is worth. Your Honor will pass on that evidence one way or the other. That is the interveners' case. Mr. MacKinnon knows very well how much of that he has to meet, and he will meet it irrespective of the condition of this pleading. There is prima facie sufficient evidence in this record to support, by inference and otherwise, all allegations of the complaint in intervention.

The Court: I certainly could not dismiss the complaint in intervention as a whole.

Mr. MacKinnon: I think you could.

The Court: I do not see much point to that.

Mr. MacKinnon: I do not either, but I would like to know [762] what we will be called upon to meet.

The Court: There was before the Court a complaint here which set forth matters which constituted a cause of action before the plaintiff's complaint was amended.

Mr. MacKinnon: I did not get that.

The Court: I said there was a complaint in intervention here which set forth a cause of action before the plaintiff's complaint was amended.

Mr. MacKinnon: That is right, but the complaint in intervention before the Court has not been sustained one iota by the proof that has been adduced.

The Court: There is as much evidence to sustain it, on the same issues, the complaint in intervention, as there is the plaintiff's complaint.

Mr. MacKinnon: On the same issue, but the same issue is not presented. I disagree with Mr. Clark on that.

The Court: Then there is no basis for dismissing the complaint.

Mr. Clark: The point is Mr. MacKinnon's move is quite adroit.

Mr. MacKinnon: The Federal Rules are very clear.

Mr. Clark: He moves to dismiss the complaint in intervention, which brought duality into the case, and then—just a minute, your Honor—once he gets rid of that, he hopes he will then make a motion to strike most of the plaintiff's case [763] because plaintiff's supplemental complaint does not go as far as their case does.

The Court: I do not want to be abrupt about this matter, but I am not going to rule on a motion to dismiss a complaint in a case of this kind where unquestionably there is a novel issue which everyone has told me exists in the case.

Mr. Clark: There is. There is no question about its being a novel case.

The Court: I will invoke a rule which I sometimes do in this type of case, Rule 12(d). Maybe you have heard of that rule. That is 12(d) of the Rules of Civil Procedure. I wrote a few decisions on it, that when there is some unusual question presented to the Court, it is foolish for any judge to try to accomplish justice by ruling on a matter that has to be determined by just what words are on paper, and until he gets a vista that the evidence gives him of what the case is really about. Both sides having had an opportunity to contribute to that, you intelligently decide whether the plaintiff is entitled to remain in court or not, and in this case the interveners. I am not going to dismiss the complaint in intervention on any ground of a more or less technical nature at this stage of the proceeding. You have a perfect right to make it. [764]

Mr. MacKinnon: I want to know what we have to meet. That is what I am more interested in than anything else.

The Court: You have a lot of lawyers sitting with you. I can see they follow the evidence in great detail. Everybody has made notes on it. You know exactly what evidence has been presented, and I do not think I have to give any advice to you as to what evidence you have to put in to meet the evidence that has been presented. You are not going to accept that compliment, are you?

Mr. MacKinnon: I will accept any compliment, your Honor. But aside from the compliments I will say this: With respect to streamlining this case, as long as the allegations remain that are here, I know of no way of streamlining it.

Mr. Clark: The allegations have nothing to do with it, your Honor.

Mr. MacKinnon: Is that statement for the record?

Mr. Clark: I say the allegations have nothing to do; the proof is in and the proof is what you will have to meet.

The Court: I do not think you necessarily have to get yourself into the frame of mind that you have to spend the rest of the year putting in a defense just because you think the Court should have granted a motion to dismiss the interveners' complaint, because you can pick out the essential things and present your evidence. You will make a better showing if you do that than if you scatter your shot. [765]

Mr. MacKinnon: That is right, but the essentials are not clear. That is one of the things that is true in this case.

The Court: You haven't got, so far as the factual record is concerned, such an awful lot to elaborate on, I do not think.

Mr. MacKinnon: No, but the written record was contemporaneous. That is the point in a nutshell. It is a contemporaneous record.

The Court: I know, you have argued that before, so has Mr. Adams, and on the cross-examination of one witness all I saw was an elaboration of some of the things. Elaboration does not necessarily mean that that proves anything more than it is an elaboration. I only suggested that in the interest of your own case, you pick out your strongest shots and shoot them—not all the shot that you may have, because sometimes it so happens when you do that, you tend to bolster up the other fellow's case.

Mr. MacKinnon: I am not afraid of that in this case. I am not remotely concerned with that. The written record that was made here was made out in the open. There is no doubt in my mind. As I said to your Honor at the inception, there is a legal question.

The Court: I do not think there is anything concealed about the case. I agreed with you on that. It is out in the open. You just pick out the things that you think fully present the whole aspects of the factual case.

Mr. MacKinnon: That is right. [766]

The Court: You do not have to go back to Adam, you do not have to lug in everything to do that. It does not necessarily follow that that adds anything. Because a man wrote four letters on the same subject does not add anything to your case, after your opponents put in one letter and you put in the other three letters, unless there is something that adds to it in some way it is just accumulative. The record does not become any more persuasive by its size.

Mr. MacKinnon: That I am convinced of. As a matter of fact, I would be very happy to make a record as brief as possible in any case.

The Court: I think the interest of justice would be best served by my reserving my ruling on your motion under 12D and you can renew it again when all the evidence is in, and then you really will be in a position to have all the ammunition with which to proceed with your argument. We will recess until tomorrow morning at 10:00 o'clock.

* * *

ALEXANDER PERRY OSBORN

called on behalf of the defendants; sworn.

The Clerk: Will you state your name to the Court.

The Witness: Alexander Perry Osborn.

Direct Examination

By Mr. Adams:

Q. Mr. Osborn, you are a resident of the city of New York? A. I am. [768]

Q. And you are one of the counsel in this case?

A. I am.

Q. You also have been for a number of years a director of the plaintiff corporation, the Western Pacific Railroad Corporation?

A. I have.

Q. When did you first become a director?

A. 1937.

Q. And you have been continuously a director since that time? A. Yes, sir.

Q. You are a graduate of Princeton, 1905?

A. Yes.

Q. And you were admitted to the bar in 1910?

A. Yes.

Q. You are also a graduate of the Harvard Law School, 1909? A. Yes.

Q. And you have been admitted to practice in the New York State and Federal courts?

A. Yes, sir.

Q. From 1910 until 1922 you were engaged in the practice of law in New York?

(Testimony of Alexander Perry Osborn.)

A. Yes, sir.

Q. And then from 1922 to 1934 you were a partner in a banking firm having its offices in New York?

A. Yes, sir. [769]

Q. That was the firm of Redmond & Company?

A. Yes, sir.

Q. Thereafter, in 1934, you resumed the practice of the law?

A. Yes, sir.

Q. Since that time you have been practicing law with offices in New York City?

A. Yes.

Q. Will you state briefly the nature of your law practice.

A. I have been active in corporation reorganization work in connection particularly with the Chicago, Milwaukee and St. Paul Railroad Company. I have acted as a trustee for several estates, and I have done some work in connection with the qualification of securities before the Securities and Exchange Commission. I have done what we call surrogate practice work in New York, settlement of estates. Beyond that a general practice.

Q. From time to time you have been a director of various companies?

A. Yes, sir.

Q. You do have a connection, do you not, with the American Museum of Natural History in New York?

A. Yes, sir.

Q. Please state what that is.

A. For many years I acted as president of the corporation, and I am now First Vice President.

Q. At whose suggestion, Mr. Osborn, did you

(Testimony of Alexander Perry Osborn.)

become a director [770] of the plaintiff corporation?

A. Mr. Schumacher, who was a friend of mine, told me that Mr. Winthrop Aldrich, president of the Chase Bank, had suggested that I become a director of the corporation.

Q. At that time what interest did the Chase Bank have in the corporation?

A. The Chase Bank had loaned the corporation large sums of money and had taken bonds of the defendant railroad company as collateral for those loans, also some bonds of the Denver, Rio Grande and Western Railroad Company; so it was a large secured creditor of the corporation.

Q. And did you thereafter, while you were a director of the corporation, keep the representatives of the Chase Bank advised on the corporation's situation as the years went along?

A. Well, from 1937 to the middle of 1943, I kept them advised. By that time they had disposed of their collateral, and, as you recalled, in November, 1943, they released any deficiency judgment they might have had against this corporation.

Q. That final release took place when the agreement became effective May 1, 1944; that is the fact, is it not? A. Yes.

Q. Now, had you previously had any connection with any member of the Western Pacific group?

Mr. Clark: Previous to what date, may I ask, your Honor?

(Testimony of Alexander Perry Osborn.)

Mr. Adams: To his becoming a director. [771]

A. I was an assistant lawyer in a case involving the inheritance tax of Mr. Arthur Curtis James' father, but it seems that is rather a far cry from having a connection with any members of this group.

Q. That is Mr. D. Willis James?

A. D. Willis James.

Q. That was way back when? A. 1910

Q. Aside from that you haven't had any connection? A. I don't recall any.

Q. Aside from that connection have you ever had any connection, in a business or professional way, with A. C. James or any of his interests?

A. Well, I also had one matter involving negotiations by the Phelps Dodge Corporation, in which Mr. James had a large interest, but it was wholly collateral with this issue.

Q. It had no connection in any way with the Western Pacific?

A. No, none whatsoever.

Q. And about when did that take place?

A. Perhaps 1939; I can't place it exactly.

Q. Now, during the time you have been a director of the corporation have you at all times sought in your office as director to protect the interests of the corporation to the best of your ability?

A. Yes, sir. [772]

Q. You were for a time a director of and a member of the executive committee of the Western

(Testimony of Alexander Perry Osborn.)

Pacific Railroad Company; is that not the fact?

A. That is the fact.

Q. And in those capacities, is it the fact that your directorship and membership in the executive committee came to an end in November of 1944?

A. That is correct.

Q. That was prior to the time when the reorganization trustees returned the property to the reorganized railroad company, is it not?

A. Yes, sir.

Q. And at whose suggestion did you become a director and member of the executive committee of the railroad company? A. Mr. Schumacher's.

Q. Did you ever attend, as far as you can recall, any meeting of the directors of the railroad company?

A. I don't recall attending any meeting of the railroad company.

Q. Do you recall ever attending any meeting of the executive committee? A. No, I do not.

Q. It is true, is it not, Mr. Osborn, that this directorship in the railroad company—that is, yours—was simply an outgrowth or incident of your directorship in the corporation? [773]

A. I believed it to be.

Q. And that applied likewise to your membership in the executive committee? A. Yes, sir.

Q. And it is true, is it not, that your positions as director and member of the executive committee of the railroad company while you occupied those

(Testimony of Alexander Perry Osborn.)

positions did not affect in any way your loyalty to the corporation as a director of that corporation?

A. That is true.

Q. Have you ever had any position with the reorganized railroad company? And by that I mean the railroad company from and after January 1, 1945?

A. No, sir.

Q. Now, Mr. Osborn, did you attend the meetings of the directors of the plaintiff corporation regularly?

A. Yes.

Q. Did you see Mr. Schumacher on those occasions?

A. He usually attended the meetings.

Q. And did you also see him on other occasions?

A. I saw him at the time of the meetings, and occasionally outside, in between the meetings.

Q. Would you say that in the course of the years you were a director, you have been a director of the plaintiff corporation, you became well acquainted with Mr. Schumacher? [774]

A. Yes, I was well acquainted with him, and he was a very good friend of mine.

Q. Are you familiar with Mr. Schumacher's reputation as a businessman and a railroad executive?

A. Yes, sir.

Q. Please state what his reputation was in those respects.

A. A man of great ability and great honesty of character.

Q. Now, according to your observation of Mr.

(Testimony of Alexander Perry Osborn.)

Schumacher's conduct as president and director of the plaintiff corporation, you recall he was president until 1942 and remained as a director, was he, according to your observation, at all times devoted to the corporation's interests?

Mr. Phleger: I am going to object to that as calling for this witness' conclusions, also irrelevant, incompetent and immaterial.

Mr. Adams: I will submit the question, your Honor. I asked the witness according to his observation. He was a fellow director and he said he knew Mr. Schumacher well.

Mr. Phleger: The fact is, the facts show that Mr. Schumacher during this period was a trustee of the company.

Mr. Adams: You knew that quite well, did you not?

A. I knew he was a trustee of the property, and also——

Q. Thank you. Yes. That is accurate.

The Court: Well, what is it that you were getting at? You mean was he devoted to the corporation? [775]

Mr. Adams: I am endeavoring, your Honor, to meet the contentions based upon duality, and the interveners' contentions with respect to domination and control. I believe under the cases and authorities that where a dual relationship is established, as a matter of fact, it is appropriate to inquire as to the conduct of the gentlemen who occupied such positions.

(Testimony of Alexander Perry Osborn.)

Mr. Clark: There is no contention in this case, your Honor, that the court's trustees were dominated or controlled in the least.

Mr. Adams: I am happy to have that concession.

Mr. Clark: Well, that concession was made on pre-trial.

Mr. Adams: The contention, as I understand it, is this, your Honor. The James interests dominated and controlled the plaintiff corporation.

Mr. Adams: Now, Mr. Schumacher was one of the officers of the plaintiff corporation.

The Court: Oh, that isn't what is concerning me; it is the form of your question. You asked him whether a man was devoted to the company. Suppose he says "Yes" to that. What is that going to mean to you?

Mr. Adams: I will reframe the question, your Honor.

Q. According to your observation of Mr. Schumacher's conduct during the times he was president and director of the corporation, Mr. Osborn, would you say that he had conducted himself at all times in that capacity diligently in looking after the [776] corporation's interests? A. Yes, sir.

Q. During the period you have been on the board of directors of the corporation has Mr. Willis D. Wood also been a member of that board?

A. Yes, sir.

Q. What was Mr. Wood's occupation?

A. Mr. Wood is a retired businessman. He was

(Testimony of Alexander Perry Osborn.)

active in a banking and securities firm in New York, a partner in that firm. The firm specialized in railroad securities. He is a member of the board, the board of directors, of the Missouri, Kansas and Texas Railroad Company, and member of the boards of several large insurance companies in New York. He is interested in a number of philanthropies in New York.

Q. And do you know Mr. Wood's reputation?

A. I do.

Q. Will you please state it.

Mr. Clark: We object to that, your Honor, upon the ground it is incompetent, irrelevant and immaterial and calls for the conclusion of this witness.

Mr. Adams: Your Honor, the suggestions about duality may be met, among other ways, by way of showing who the people were and of what substance they were. We have heard it pointed out with a great deal of repetition that one of these gentlemen was what the plaintiffs call a stenographer. Now I am [777] asking about Mr. Wood.

Mr. Clark: Well, we will withdraw the objection.

The Court: All right.

A. Mr. Wood was a man of very excellent reputation in every respect.

Q. (By Mr. Adams): Now, according to your observation, did Mr. Wood conduct himself in his actions as director of the corporation, as an independent director, looking after the corporation's best interests? A. Yes, sir.

(Testimony of Alexander Perry Osborn.)

Q. Do you know Mr. H. Brua Campbell?

A. I do.

Q. And he was during a portion of this time a director of the plaintiff corporation?

A. He was.

Q. Mr. Campbell was a partner in the law firm of Pierce & Greer during that time also, was he not?

A. I understood that was the case.

Q. From your observation of Mr. Campbell's conduct as a director would you say that he was an independent director looking after the best interests of the corporation?

A. That was my observation.

The Court: Campbell was a director of the corporation?

Mr. Adams: Yes, your Honor.

Mr. Clark: As well as a partner in Pierce & Greer. [778]

Mr. Phleger: And general counsel for the defendant company.

Mr. Clark: In New York.

The Court: Was he a director of the company, too?

Mr. Adams: He was.

Mr. Phleger: Here he is right here (indicating on chart).

Mr. Clark: Yes, and he was also a director of the railroad company for a time, your Honor, and the exhibits show that.

Mr. Adams: I believe that is correct.

(Testimony of Alexander Perry Osborn.)

Mr. Phleger: He was also general counsel for the railroad company.

Mr. Clark: And the railroad corporation.

Mr. Adams: We will get those facts established.

The Court: You can make that point in your argument. The chart does not show him as a director of the corporation.

Mr. Phleger: Not during this period, no—yes, he was.

Mr. Clark: Yes, he was a director of the corporation. Yes, he was a director, and the annual reports show it. The chart in evidence shows all of that, your Honor.

The Court: Very well.

Q. (By Mr. Adams): You knew, of course, that Mr. Schumacher was a trustee in the reorganization? A. I did.

Q. Is it the fact that your fellow directors on the board of directors were also familiar with that?

A. I believe they were.

Q. During the period that you have been a director, has the firm of Pierce & Greer and Mr. Frank C. Nicodemus, Jr., a member of that firm, been the counsel of the plaintiff corporation?

A. They have.

Q. And you are, of course, well acquainted with Mr. Nicodemus? A. Yes.

Q. And I take it that it is within your knowledge to state that Mr. Nicodemus and Mr. Schumacher were very close associates?

(Testimony of Alexander Perry Osborn.)

A. Well, Mr. Nicodemus acted as counsel for Mr. Schumacher.

Q. Perhaps I did not put that just the right way. What I have in mind is you and your fellow directors were aware, of course, that Mr. Nicodemus and Mr. Schumacher were very well acquainted?

A. Oh, yes.

Q. You knew, did you not, that during the period of trusteeship Mr. Nicodemus represented the debtor in this reorganization proceeding?

A. Yes.

Q. And by "the debtor" we mean the Western Pacific Railroad Company which went into bankruptcy? A. Yes.

Q. And you also knew, did you not, that Mr. Nicodemus was from time to time advising Mr. Schumacher on trustees' problems? A. I did.

Q. It was your understanding, I take it, that he was not [780] officially an attorney to the trustees, that position being occupied by their counsel, but that he was advising Mr. Schumacher personally from time to time upon trustees' problems?

A. I though he was.

Q. That was your understanding?

A. That was my understanding. [781]

* * *

Q. Mr. Osborn, you are aware, of course, of the claim the corporation had against the Railroad Credit Corporation arising out of the reorganization? A. Yes.

(Testimony of Alexander Perry Osborn.)

Q. Was Mr. Nicodemus active in asserting those claims? A. He was.

Q. Is that likewise the case with regard to the claims of the corporation against the Reconstruction Finance Corporation [785] arising out of the reorganization? A. Yes.

Q. It is likewise the fact with regard to the claims that the corporation is now pressing against the Sacramento Northern? A. Yes, sir.

Mr. Adams: One aspect of which was before your Honor recently and your Honor made a ruling upon an order that Judge St. Sure had previously made.

The Court: Yes.

Q. (By Mr. Adams): To your knowledge, Mr. Osborn, has Mr. Nicodemus ever failed to assert a claim of the corporation?

Mr. Clark: Just a minute. I will object to that upon the ground it calls for the opinion of the witness. It is incompetent, irrevelant and immaterial.

Mr. Adams: It is a question as to the knowledge of the witness.

The Court: Read the question.

(Question read.)

Mr. Clark: It is vague and indefinite, too.

Mr. Phleger: Beyond that, this is based upon Mr. Nicodemus having knowledge of claims. What claims?

Mr. Adams: I think Mr. Phleger's suggestion is good.

(Testimony of Alexander Perry Osborn.)

The Court: Ask him if there was any action the corporation requested him to take which he refused or failed to take.

Mr. Adams: Thank you, your Honor. May I ask if Mr. Osborn [786] would answer that question?

The Witness: I know of no instance in which he failed to perform his duty or respond to a request of the corporation.

Q. (By Mr. Adams): Do you know of anything, Mr. Osborn, that existed to prevent Mr. Nicodemus from asserting the present claim now being heard in this court during the reorganization if he had known about it?

Mr. Phleger: I object to that.

The Court: That is pretty hypothetical.

Mr. Phleger: It calls certainly for the opinion of this witness.

The Court: Would you read the question.

(Question read.)

Mr. Clark: Hypothetical, argumentative.

The Court: I think that is irrelevant. I will sustain the objection.

Q. (By Mr. Adams): It is the fact, is it not, Mr. Osborn, that as a director of the corporation you know that the New York office was a joint office of the plaintiff corporation and the railroad company? A. Yes, sir.

Q. Did you see anything inappropriate or unusual in that arrangement? A. I did not.

(Testimony of Alexander Perry Osborn.)

Q. You knew, did you not, that during the period prior to June [787] 1943 the expenses of that office were paid in part by the plaintiff corporation and in part by the reorganization trustees?

A. I knew that.

Q. And did you consider that that arrangement was in any way inappropriate or disadvantageous to the plaintiff corporation? A. No.

Q. Now, the record here shows that in June of 1943, the beginning of that time and continuing until the New York office was closed—strike that.

I had better state the record more accurately. The record here shows that beginning June 1, 1943, and until the end of 1944, which was the end of the trustees' operations, the entire expense of the New York office was paid by the reorganization trustees; that then that office remained opened for a period of four months, and during that period of four months those expenses were paid by the reorganized railroad company.

Now, when, if you recall, Mr. Osborn, did you learn about the arrangement for the reorganization trustees to take over the whole expense of the New York office?

A. Contemporaneously with the facts.

Q. Did you then see anything inappropriate about that arrangement? A. No.

Q. Did you see anything in that arrangement at that time that you considered disadvantageous to the plaintiff corporation? [788] A. No.

(Testimony of Alexander Perry Osborn.)

Q. The New York office was the head office of the Western Pacific group, was it not?

A. Yes, sir.

Q. And did the board of directors of the corporation determine policy in regard to Western Pacific matters?

Mr. Phleger: Now, just a moment. What do you mean by "Western Pacific"? Do you mean railroad matters?

Mr. Adams: I mean with regard to all Western Pacific interests that the plaintiff corporation had. Does that characterize it?

Mr. Phleger: Do you mean did the directors of the plaintiff corporation determine its policies?

Mr. Adams: I think that is what it comes down to, so I am persuaded to withdraw the question; I think it is self-evident.

The Court: Yes, I think so.

Q. (By Mr. Adams): Now, Mr. Osborn, do you recall that on March 15, 1943, the Supreme Court approved the Interstate Commerce Commission's plan of reorganization? A. Yes, sir.

Q. And what was your judgment as a director at that time of the effect of the decision on the plaintiff corporation?

A. I thought it ended the interests of the corporation in the railroad company. [789]

Q. You thought it was substantially a final decision against the plaintiff's equity?

A. It seemed so to me.

(Testimony of Alexander Perry Osborn.)

Q. That was your understanding?

A. It seemed so to me.

Q. And do you know whether or not the board of directors had the same view?

Mr. Phleger: The minutes are in evidence, I think, on that question.

A. Yes, they had the same view.

Q. (By Mr. Adams): Now, Mr. Osborn, prior to October of 1946, which is the time when this lawsuit here was instituted, did you ever suggest to Mr. Polk or Mr. Coulson that either of them had any obligation to advise the plaintiff corporation of possible claims against other group members on account of the tax transactions?

A. Would you mind reading that to me?

(Question read.)

A. No.

Q. And prior to that time, October of 1946, did Mr. Polk or Mr. Coulson ever refuse to provide you with any information which you asked of them in connection with the tax transactions?

Mr. Phleger: Well, now, that assumes that he asked them.

The Court: Yes, it is a little double-barreled, Mr. Adams.

Q. (By Mr. Adams): Is it the fact that you did make inquiry, [790] Mr. Osborn, about the tax transactions?

A. I made no inquiry of Mr. Polk and Mr. Coulson.

(Testimony of Alexander Perry Osborn.)

Q. I see. So that no occasion ever arose of the possibility of their either furnishing or declining to furnish any information?

Mr. Phleger: Now, I object to that because it assumes a very important fact that your Honor will have to pass on, as to what the obligations of attorneys are about advising their clients. He is asking this man whether or not he asked the attorneys to advise them. How about the attorneys being under an obligation themselves to advise?

The Court: Well, I think that the answer that he didn't make any inquiries disposes of that.

Q. (By Mr. Adams): Now, do you recall the corporation receiving advice in April, 1947, that a settlement proposal had been made to the Bureau of Internal Revenue with regard to these tax matters? A. Yes, sir.

Q. And were you advised at that time of the terms of the settlement proposal?

A. Well, I was advised in the sense that we received a letter, which Mr. Curry presented to the board—a letter, I think, from Mr. Polk—that outlined the terms of the proposed settlement. [791]

* * *

Q. (By Mr. Adams): Now, Mr. Osborn, you have before you Plaintiff's Exhibit 68?

A. Yes, sir.

Q. Consisting of a letter addressed by Mr. Curry to Pierce & Geer of April 4, 1947, and enclosures, and you note that the letter itself shows, "Copy,

(Testimony of Alexander Perry Osborn.)

Mr. A. Perry Osborne, 20 Exchange Place, New York 5, New York''? A. Yes, sir.

Q. And does that refresh your recollection that you received a copy at that time?

A. I remember seeing the copy of the letter of Mr. Polk to Mr. Curry at that time, yes—receiving that.

Q. And that is a portion of Plaintiff's Exhibit 68, being a copy of the letter of April 4, 1947, and marked also 41-B to -D? [792]

A. That is correct.

Q. Now, then, you notice also that Plaintiff's Exhibit 68 includes, as an enclosure, the pages marked 41-E to -F? A. That is correct.

Q. Being a copy of a letter signed, "Western Pacific Railroad Corporation, James K. Polk, Attorney in Fact," and dated February 11, 1947, addressed to the Hon. Joseph D. Nunan, Jr., Commissioner of Internal Revenue? A. Yes, sir.

Q. And when I asked you the question that I did a moment ago, and you answered the question regarding your receiving advice that a settlement proposal had been made to the Bureau of Internal Revenue, were you referring to the advice shown upon Plaintiff's Exhibit 68? A. Yes, sir.

Q. Thank you. You may look at that further if you wish to do so. A. Yes.

Q. You knew, did you not, Mr. Osborn, at that time that the plaintiff corporation was free to accept or to reject the settlement proposal as it might see fit? A. Yes, sir.

(Testimony of Alexander Perry Osborn.)

Q. Now, strictly from the standpoint of the settling of the matter with the Government for taxes for the period in question, did you consider that the settlement was a good one—and I [793] am leaving out of my question anything about the intercorporate claims? A. Yes, sir.

Q. Was that the judgment of your fellow directors?

A. It was the judgment of the committee that was appointed to consider the matter.

Q. And the committee consisted of yourself, Mr. Wood and Mr. Nicodemus?

A. That is correct, and Mr. Curry as ex officio.

Q. And Mr. Curry, ex officio. Now, is it the fact that nevertheless, notwithstanding your view about the advisability of a settlement as regards the Government, that the directors seriously considered withdrawing Mr. Polk's power of attorney and refusing to go along with the settlement?

A. They certainly considered that.

Q. And what was their reason for considering that?

A. The reason, I believe, was the desire of the corporation to have the matter submitted, the question of the claim of the corporation, as a legal and equitable matter before some competent court, and because of the inability to have that done, because of the answers which the defendant made, which raised technical objections to that course—and our position was that those technical defenses should

(Testimony of Alexander Perry Osborn.)

be withdrawn and the claim should be submitted as a matter for legal and equitable determination.

Q. And by "technical defenses" you have reference particularly, do you not, to the defense that the reorganization proceeding is a bar?

A. That is correct, sir. And the other technical defenses, the statute.

Q. Statute of limitations?

A. And delay of the corporation in asserting the claim.

Q. Now, the board finally took the position, did it not, that the settlement with the Government should be approved? A. It did, yes.

Q. But in connection with doing that, the board had, prior to that time, obtained an agreement for a stipulation which is the stipulation that was afterwards filed with the court; is that the fact?

A. That is correct.

Q. Yes.

The Court: Well, that is the stipulation that was made which made it possible to make a settlement without anybody waiving any claims in regard to subsequent litigation?

Mr. Adams: That is correct.

Mr. Clark: That is the time we came in with an application for injunction.

Q. (By Mr. Adams): Now, so far as you can see, Mr. Osborn, was the corporation in any way prejudiced by reason of the fact that it obtained notice of the settlement in April, 1947, [795] in-

(Testimony of Alexander Perry Osborn.)

stead of February, 1947, when the settlement was proposed?

Mr. Phleger: Well, I object to that as calling for the conclusion of the witness, a legal matter.

Mr. Adams: This is a director of the plaintiff corporation.

Mr. Phleger: It doesn't make any difference. That may be one of the questions.

The Court: That may be true, but what is the materiality of asking his opinion concerning that?

Mr. Adams: I understand that contentions are to be made here that in some fashion or other, which I am frank to say I do not understand at all, there was some prejudice to the corporation derived from the fact that the settlement proposal was first made in February, 1947, but the corporation wasn't advised about it until April, 1947. Now I am asking one of the directors of the corporation, who participated in the transactions, if there was any prejudice to the corporation resulting from that delay.

The Court: Well, that would be a legal question, if it were material.

Mr. Phleger: But perhaps I can help counsel. We introduced evidence of that not for the purpose at all of showing prejudice to the plaintiff corporation; we introduced it for this purpose: and it is absolutely and conclusively proof of it—that the matter was taken over and handled by the [796] defendant, namely, the defendant made all of the decisions with respect to this offer of settlement

(Testimony of Alexander Perry Osborn.)

and the negotiations of settlement, without even advising the plaintiff corporation. That is our point. They passed these letters in April 2; they communicated with San Francisco, the directors of the defendant in San Francisco met, authorized them. And it wasn't until April, three months later, that this corporation was advised for the first time.

Mr. Clark: You mean the letters passed on February 11, Mr. Phleger, not April 2.

Mr. Phleger: Yes; well, I mean the letter to the plaintiff corporation was in April.

* * *

Q. Mr. Osborn, when and where did you first meet Colonel Coulson?

A. I met him at my first attendance at the board meeting of the corporation; I think it was in early 1937.

Q. And he was then a director of the plaintiff corporation? A. Yes, he was. [797]

Q. Now, you know, of course, that throughout the reorganization proceedings Mr. Coulson was the attorney for the A. C. James Company, and in those proceedings? A. Yes, sir.

Q. And you knew, of course, that throughout the period he was a director and thereafter that Mr. Coulson and his firm have been attorneys for the James interests? A. Yes, sir.

Q. And for Mr. Arthur Curtis James personally while he was living? A. Yes, sir.

(Testimony of Alexander Perry Osborn.)

Q. Did you ever do any legal work for Colonel Coulson or for his firm? A. No, sir.

Q. Did you ever do any legal work for Mr. James or his companies? I will list them very quickly: the A. C. James Company, the Curtis Southwestern Corporation, the Curtis Southwestern Company, the James Foundation of New York, Inc. Did you ever do any legal work for any of those interests, other than the two incidents you have spoken of, one of them relating to D. Willis James and the other relating to the Phelps Dodge matter?

A. No, sir.

Q. Now, when you were asked to become a director of the plaintiff, were you told that you were to represent any interest other [798] than the general interest of its stockholders? A. No, sir.

Q. During the period of your service as a director of the plaintiff corporation, have you ever been told how you should vote on matters coming before the board of directors? A. No.

Q. Did any representative of the James interests ever request you to vote for or refrain from voting on any matter coming before the board?

A. No, sir.

Q. Were you yourself dominated or controlled in the discharge of your duties as a director by any representative of the James interests?

A. No, sir.

Q. And is the same answer to be given with respect to the Colonel Coulson?

(Testimony of Alexander Perry Osborn.)

A. You mean as to whether he——

Q. Dominated or controlled you in your conduct as a director. A. Not whatsoever.

Q. During the period of your directorship, did you keep yourself informed with regard to the affairs of the plaintiff corporation?

A. Yes, sir.

Q. And did you exercise your best judgment on matters coming before the board during that period? [799] A. Yes, sir.

Q. Were you afforded as a director full opportunity to discuss matters coming before the board?

A. Yes, sir.

Q. And that is likewise true as to all other members, is it not, of the board? A. I thought so.

Q. And did the directors freely discuss matters that came before them? A. Yes, sir.

Q. Did any representative of the James interests ever ask you to refrain from bringing up any matter for consideration before the board?

A. No.

Q. Now, I have asked you a number of questions about the James interests. Is the same thing true as regards the defendant railroad company? That is, to put it generally, did any representative of the defendant railroad company at any time——

Mr. Adams: Now, just a moment, your Honor. May I think out loud about this? I think I am asking something not in issue. I think the interveners' contentions of domination and control as be-

(Testimony of Alexander Perry Osborn.)

tween the trustees and the plaintiff corporation, as between the defendant railroad company and the plaintiff corporation, assuming the subsidiary could control a parent—I think all such contentions have been withdrawn. I understand there [800] is still a contention——

* * *

Mr. Adams: ——on the part of the interveners that the James interests dominated and controlled the parent corporation. That completes my statement.

Mr. Clark: That is correct.

Mr. Phleger: I might, for the purpose of clarification, say that our contention very definitely is that the trustees when in office and the corporation after it succeeded to these properties, took over and handled and managed these tax matters.

Mr. Adams: Well, may I ask Mr. Phleger——

Mr. Phleger: I mean the company; excuse me.

Mr. Adams: May I ask Mr. Phleger just to clear that up?

Mr. Phleger: I don't suggest by that that there is anything invidious about domination, but they just did. They ran it, made the decisions.

Mr. Adams: Well, I am just seeking to find out what the contention is, because I have to ask the witness some questions.

Mr. Phleger: Yes.

Mr. Adams: Now, it has been my understanding that there is no contention that the reorganization

(Testimony of Alexander Perry Osborn.)

trustees dominated or [801] controlled the plaintiff corporation. Is that a fact?

Mr. Phleger: I think my position is absolutely clear. Mr. Schumacher was a trustee and Mr. Curry was Mr. Schumacher's man. Now, I don't predictae anything upon that at all, but that is a fact that is in this record. The evidence we produced was directed to the proposition that these tax matters were handled by the defendant corporation, and the decisions made by it. Now, I don't characterize that as anything except just that.

* * *

Q. Mr. Osborn, did the trustees in reorganization or either of them to your knowledge at any time instruct you as to how you should act?

A. No, sir.

Q. As a director? A. No, sir.

Q. And they never at any time told you how to vote or what to say or in any way interfered with free exercise of your judgment as a director, is that correct? [802]

A. That is correct.

Q. Did the trustees or either of them at any time to your knowledge give any instructions or directions to any member of the board of directors of the corporation as to how to conduct himself or the corporation's affairs?

A. I never heard of any instructions being given.

Q. And it is the fact, is it not, that you were, as a director, not in any wise dominated or controlled in the discharge of your duties by the court's

(Testimony of Alexander Perry Osborn.)

trustees, either of them or any representative of those trustees?

* * *

A. I was not.

Q. (By Mr. Adams): During the period of your services as a director of the plaintiff corporation did any representative of the James interests at any time ask you to pursue a course of conduct in the special interest of Mr. James or his companies? A. No, sir.

Q. During the period of your service at any time as a director of the plaintiff did Colonel Coulson at any time ask you to pursue any course of conduct in the special interest of the [803] James interests?

A. No, sir.

Q. I have been speaking of the James interests generally, and would the answers that you have given me with regard to the questions I have asked as to anyone offering to give you any advice or instructions as to how you should act or in any way interfering with your term as a director; would those answers to those questions be the same if I were to ask you whether any officer or trustee of the James Foundation sought to interfere with your conduct as a director?

A. I can't exactly answer that question. I think advice was given, but the question was whether the advice was solid.

Q. Let me ask these questions: Did any officer or trustee of the James Foundation ever tell you

(Testimony of Alexander Perry Osborn.)

how you should vote on matters coming before the board? A. No, sir.

Q. Or tell you to refrain from voting on any matters coming before the board? A. No, sir.

Q. Or tell you who should be selected as officers of the plaintiff corporations? A. No, sir.

Q. Or tell you who should be selected as directors of the plaintiff corporation?

A. No, sir.

Q. Or tell you how in any respect you should conduct yourself as a director of the plaintiff corporation? A. No, sir.

Q. Did you as a director of the plaintiff ever consciously act in the interest of the James Foundation to the detriment of the plaintiff corporation of which you were a director? A. No, sir.

Q. Did you vote for the election of Mr. Curry as president of the plaintiff corporation in January, 1942? A. I did.

Q. And in casting your vote did you exercise your best judgment as you saw it in the interests of the plaintiff corporation? A. I did.

Q. And after his election as president, I take it Mr. Curry was the presiding officer at the meeting of the board of directors? A. Yes, sir.

Q. During the period of your directorship you were aware, were you not, that Mr. Curry received compensation from the reorganization trustees?

A. I was not aware that his compensation came from the reorganization trustees. I knew that at

(Testimony of Alexander Perry Osborn.)

one time he was receiving compensation from the corporation, from the company, and after June, '43, wasn't it, he received his compensation from the company exclusively, and that lasted until the New York office was closed, and thereafter I knew that he was receiving some [805] pension from the company and also some compensation from Colonel Coulson's firm.

Q. When you speak of receiving compensation from the company in 1943 and 1944, I take it you had no purpose to insist that the company was not then in reorganization? A. Oh, no.

Q. Did you as a director of the plaintiff corporation disapprove of Mr. Curry's receiving a retainer from the firm of Whitman, Ransom, Coulson & Goetz? A. No, sir.

Q. The fact is, is it not, Mr. Osborn, that at or about the time of closing the New York office you discussed with Mr. Schumacher and Mr. Coulson the idea of doing something for Mr. Curry in view of his pending retirement?

A. Yes, sir, without indicating who should do it or what should be done; I just said I thought he ought to be taken care of.

Q. Precisely.

The Court: During the time that you were director of the corporation in 1943 and 1944 did the directors ever discuss the filing of these consolidated tax returns at or about the time they were filed?

The Witness: No, sir. [806]

(Testimony of Alexander Perry Osborn.)

Q. (By Mr. Adams): Mr. Osborn, you said you have been a director of a number of corporations?

A. Yes, sir.

Q. Would you say that was ten or more?

A. You asked me to prepare a list.

Q. I am just asking you for an approximate number. I do not want to go into detail unless that is necessary.

A. According to the list prepared by my secretary it is seventeen in all.

Q. Was the matter of the income tax returns ever taken up at any board meeting of any corporation of which you were a director?

* * *

Q. (By Mr. Adams): Mr. Osborn, during all the time you were a director of the Western Pacific Railroad Corporation, were the income tax returns ever taken up with the Board of Directors?

* * *

The Witness: As the question is put, it is very hard to answer. May I answer the question in my own way?

Q. (By Mr. Adams): Answer it according to your best recollection.

A. My best recollection is that the income tax returns were not taken up with the Board of Directors at any time prior to June, 1946, when the suit, the VanKirk action, was filed, nor was there any discussion of income tax returns in the Board of Directors.

(Testimony of Alexander Perry Osborn.)

Q. Mr. Osborn, until you learned of the institution of the stockholders' action in New York in the middle of 1946 and of the claims stated in that action, had the thought ever occurred to you of the plaintiff having any claim on account of the benefits to the court's trustees or the railroad company in these consolidated returns? A. No, sir.

* * *

Q. (By Mr. Adams): Prior to that time when you learned of the claims advanced in the stockholders' action in New York, had any officer or director of the plaintiff stated to you that he [808] thought or considered that the plaintiff corporation had any rights rising out of the benefit to the court's trustees of the railroad company in these consolidated returns? A. No, sir.

Q. You had heard no such suggestion from anyone prior to that time? A. No, sir.

Q. You knew, did you not, during the years 1943, 1944 and 1945 that the holding company was filing consolidated income tax returns?

A. Yes, sir.

Q. And you know, did you not, that the consolidated returns included the operations of the railroad in the hands of the court's trustees?

A. Yes, sir.

Q. And you know, did you not, that there were substantial, large advantages in respect of the taxes upon the income of the railroad incident to these consolidated returns?

(Testimony of Alexander Perry Osborn.)

A. I knew there were benefits in filing consolidated returns which the railroad company would secure and I have testified that I knew they were substantial benefits, I think, but I had no knowledge of what the benefits were.

Q. It is the fact, is it not, Mr. Osborn, that you knew that there were large and substantial benefits to the taxes upon the railroad's income derived from these consolidated returns filed [809] by the holding company?

A. I had no knowledge of what the benefits were. I thought there were benefits and I testified that they were substantial benefits.

Q. Let me ask you this to refresh your recollection: Turn to page 4239 of the record of your deposition taken in this action. In fact, being at the bottom of page 4238, if you will, two lines from the bottom. Will you follow as I read, it Mr. Osborn?

A. Yes, sir, 4238?

Q. 4238, at the bottom. A. Yes.

Q. "Q. At the time of the filing of the consolidated returns for 1943 and 1944 did you know that there were large tax benefits to the railway company in the filing of the consolidated return?

"A. I knew there were benefits to the railroad company from the filing of consolidated returns.

"Q. In connection with the last question and the last answer I read the following question and answer from the transcript of your testimony upon the taking of your deposition in February, 1947, in the New York stockholders' suit."

(Testimony of Alexander Perry Osborn.)

A. Mr. Adams, excuse me. What page are you reading from?

Mr. Clark: There was a mistake in the page. It was 4239, [810] Mr. Osborn. I think counsel mentioned 4238. It is 4239.

Q. (By Mr. Adams): I began at the bottom of page 4238, two lines from the bottom and I am continuing on page 4239. My copy shows that that is what I am doing.

A. I am now looking at page 4239.

Q. Have you had any trouble about that?

A. No, I was looking at 4238 before.

Q. I said I was beginning at the bottom of that page.

A. Yes, but I was not following you. Now I am following you.

Q. Then beginning with a question, "in connection with the last question—" do you have that?

A. I have that, yes.

Q. "Q. In connection with the last question and the last answer, I read the following question and answer from the transcript of your testimony on the taking of your deposition in February, 1947, in the New York stockholders' suit, upon examination by counsel for the plaintiff stockholders page 343, bottom:

"Q. Did you know that contemporaneously with the filing of the 1943 and 1944 consolidated return?

"A. (At the top of page 344.) Only as a matter of general knowledge that there were large tax

(Testimony of Alexander Perry Osborn.)

benefits to the railroad company in the filing of this consolidated return.' [811]

"Q. Did you give that testimony at that time?

"A. I believe I did.

"Q. Was it true?

"A. I can only say this, that I cannot specify what I had in mind as to what the large benefits were.

"Q. May I have an answer to my question?

"Mr. Dickerson: I do not think that his testimony is inconsistent, Mr. Adams.

"Mr. Adams: I did not ask anything about inconsistency. I asked if the testimony was true. I would like to have an answer to my question.

"The Witness: I am sure I thought it was true at that time."

Do you recall that I asked those questions and you gave those answers at that time?

A. Yes, sir.

Q. Were the answers which you gave then upon the taking of your deposition true?

A. Yes, sir.

Mr. Adams: No further questions, your Honor.

Cross-Examination

By Mr. Phleger:

Q. Mr. Osborn, when did you first learn of the fact that the plaintiff's stock loss had been utilized in a consolidated return? A. June, '46. [812]

Q. In June of '46. That is long after the period of the filing of these tax returns?

(Testimony of Alexander Perry Osborn.)

A. Yes, sir.

Q. When did you first learn that a claim for the refund of the 1942 taxes had been filed? That was filed on March of 1945.

A. April of 1947.

Q. April of 1947, two years later. When did you first learn that a power of attorney had been given by the plaintiff corporation to Mr. Coulson's firm to represent him in this matter, the power having been given on June 26, 1946?

A. April, 1947.

Q. About a year later?

A. About a year later.

Q. In your practice do you deal with income tax matters, that is, are you an income tax man?

A. No, sir.

Q. Have you any general knowledge about consolidated returns or the tax incident to that? [813]

* * *

The Witness: What is the question?

The Court: He wants to know how much you know about affiliated corporation returns, if any. That is what the lawyers always say, "if any."

A. I have no real knowledge as a lawyer of the filing of corporate consolidated tax returns. I have never acted for any corporation in that respect.

Q. (By Mr. MacKinnon): I beg your pardon?

A. I have never acted for any corporation in that respect. [814]

* * *

(Testimony of Alexander Perry Osborn.)

Mr. MacKinnon: Will you read the question? Is it a question before the witness?

The Court: I said I took it your question was whether or not the witness had any knowledge of income tax matters having to do with consolidated corporate returns.

Q. (By Mr. Phleger): Will you answer that?

A. I had no such knowledge.

The Court: I suppose that is what you mean—I am not intending to interrupt either examination—what you are inquiring about is whether the witness has any professional knowledge concerning the matter?

Mr. Phleger: That is correct.

The Court: Trained himself or has special qualifications. [815]

Mr. MacKinnon: I see no objection to that.

Q. (By Mr. Phleger): Will you answer that?

A. What was the question now? I have had no professional experience in corporate taxation.

Q. (By Mr. Phleger): You have testified that you did not hear of the use of the loss of the plaintiff corporation in the consolidated return until June of 1946? A. That is correct.

Q. Will you state what the occasion was?

A. The occasion was the bringing of the two VanKirk actions, one in the States Supreme Court and one in the District Court in New York, in June of 1946. And I either heard of these actions and the claim therein stated from Mr. Nicodemus in

(Testimony of Alexander Perry Osborn.)

connection with the action, he being counsel for the corporation at that time, or I got the knowledge independently by receipt of the complaints in that action at or about that time. But I am unable to state whether I heard it from Mr. Nicodemus in connection with the actions or from the actions themselves.

Mr. Phleger: That is all.

Cross-Examination

(For Intervenors)

By Mr. Clark:

Q. Mr. Osborn, was the matter of the corporation giving Mr. Polk and his associates a power of attorney on June 26, 1946, over presented to the directors of the plaintiff corporation?

Mr. MacKinnon: I object to that—— [816]

Mr. Phleger: He has stated that he didn't hear about it.

Mr. Clark: He said if he didn't hear about it, and it is a preliminary question anyway.

Q. (By Mr. Clark): Now, Mr. Osborn——

A. I just answered that question. But if you want me to answer it——

Q. I thought it was answered.

A. Will you read the question? How did you put that question?

Mr. Clark: May I have it read?

The Court: There was a question and answer and then an objection.

(Testimony of Alexander Perry Osborn.)

Mr. MacKinnon: My objection to it is that it is not the best evidence. Defendants will show what was what.

Mr. Clark: You will concede, won't you, that the minutes show no such thing?

Mr. MacKinnon: You have them.

Mr. Clark: We are trying not to encumber this matter. I thought the same sort of question was asked by Mr. Adams.

Mr. Adams: No, your Honor, I asked the director——

The Court: Well, then, it was an argumentative statement of counsel.

Mr. Clark: No, may it please your Honor, Mr. Adams asked whether the matter of consolidated returns had ever been discussed, or presented to the Board of Directors, and the answer was "No." Now I am directing this specifically to the power of attorney [817] which was given by the plaintiff corporation to Polk on June 26, 1946.

The Court: He may answer it, or if he hasn't——

Q. (By Mr. Clark): Was the matter presented to the Board of Directors? A. It was not.

Q. Do you remember any prior occasion, in prior years, Mr. Osborn, when the matter of the corporation, the plaintiff corporation, getting Mr. Polk and his associates at the time at the Coulson firm a power of attorney with regard to federal income tax matters was presented to the Board of Directors?

(Testimony of Alexander Perry Osborn.)

Q. (By Mr. Clark): If it was presented to the Board of Directors, with respect to which I will direct the witness' attention to page 2928 of Mr. Curry's deposition wherein appears, read into the record, a portion of the minutes of the meeting of the Board of Directors of the corporation held on June 17, 1938 (handing to witness): If you will start right there at the bottom of the page (indicating)?

The Court: Well, what is your question, as to whether or not he recalls this meeting?

Mr. Clark: Yes, indeed, your Honor.

A. Well, I don't know whether I was present at that meeting or not.

The Court: Have you any recollection on that?

The Witness: I have no recollection of it.

Q. (By Mr. Clark): Have you any recollection of having been on any occasion the matter of Polk's receiving a power of attorney from the plaintiff corporation presented to the plaintiff's Board of Directors? A. Well, I remembered——

Mr. MacKinnon: I object to it on the grounds it is irrelevant and incompetent to any matter in issue, as to the period in question.

The Court: The witness has already said that he has no recollection.

Mr. Clark: The witness has no recollection.

Q. Now, Mr. Osborn, I show you a copy of the letter which has been called in this case the "second Krigbaum letter" dated May 19, 1947, and which

(Testimony of Alexander Perry Osborn.)

is in evidence as Plaintiff's trial exhibit 71 (handing to witness), and after you have examined that, I will ask you whether or not that letter was taken up with the Board of Directors of the plaintiff corporation by Mr. Polk prior to the time it was sent; namely, May 19, 1947.

A. No, it was not.

Q. And when was the first time, Mr. Osborn, that you learned that such a letter had been sent? That is, the letter which is Plaintiff's trial exhibit 71?

A. I first heard of the letter at the time of the actual settlement, which took place in August, 1947.

Mr. Clark: That is all, your Honor.

The Court: Anything else on redirect?

Mr. MacKinnon: I didn't hear the answer, your Honor.

The Court: Would you read the answer?

(Previous answer read by the reporter.)

The Court: Any redirect?

Mr. Adams: Just one or two questions, your Honor.

Redirect Examination

By Mr. Adams:

Q. During the period while these consolidated returns were being filed, Mr. Osborn—that is the returns for '43, '43, and '44—did you know that the firm of Whitman, Ransom, Coulson and Goetz had been engaged to advise as tax counsel in respect of these returns? A. Yes, I did.

Q. And did you ever make any inquiry from

them with regard to the returns prior to the time when you learned of the stockholders' suit?

A. No, sir. [822]

* * *

FRANK C. NICODEMUS, JR.

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court, please?

A. Frank C. Nicodemus, Jr.

Direct Examination

By Mr. Adams:

Q. Mr. Nicodemus, do you have your residence in the State of New York?

A. State of New York.

Q. And your profession is that of an attorney, having your office——

A. In the City of New York.

Q. In the City of New York. Just what is the address of your office?

A. 44 Wall Street.

Q. You were admitted to practice in Maryland in 1901?

A. 1901.

Q. Of what bars are you a member?

A. Maryland Bar, New York Bar, and various Federal Courts, including, I think, this court.

Q. When did you first become associated with the firm of Pierce & Greer?

A. Definitely along about 1905. Prior to that time I had an association dating back to 1903.

(Testimony of Frank C. Nicodemus, Jr.)

Q. And when did you become a partner in the firm? A. 1920. [823]

Q. And you are now the senior partner in the firm? A. I am now the senior partner.

Q. Have you and the firm specialized in railroad practice? A. We have.

Q. Would you please state briefly some of the railroads that have been your clients?

A. When I came into the office, my then later senior partner, Mr. Wendell S. Pierce, was general counsel of the Union Pacific Railroad Company. The junior partner, Morris Greer, was assistant general counsel of the Union Pacific. The firm also held counselships for certain of various Gould roads including the Missouri Pacific, the Denver & Rio Grande, and I believe the Western Pacific. There were others, but I have named the principal ones, except perhaps I should mention the Wabash, which ultimately became my most important client.

Q. And you are now general counsel for the Wabash? A. I am senior counsel.

Q. Senior counsel. Were you well acquainted with Mr. Thomas M. Schumacher, who was one of the trustees in reorganization? A. I was.

Q. And you first become acquainted with him when?

A. I think in 1929 or '30. I first met him at the time he became a director of the Denver & Rio Grande Western Railroad Company, which was shortly after the James interests acquired their

(Testimony of Frank C. Nicodemus, Jr.)

stock position in the Western Pacific Railroad Corporation. [824]

Q. That was in 1926, was it not, to be sure about our times—if they are important?

A. I thought it was '27, but——

Q. About that time?

A. About that date.

Q. Now beginning some time in 1934, was your firm engaged as general counsel for the Western Pacific Railroad Corporation?

A. We were.

Q. And from that time forward, and so long as Mr. Schumacher was active in railroad business, did he look to you for day to day advice?

A. I think he did. In railroad matters.

Q. And did he, to your knowledge, ever consult any other counsel in respect of such matters?

A. Railroad matters?

Q. Yes.

A. I can recall no occasion when he did.

Q. Was it at his suggestion that you became general counsel to the corporation?

A. I think that it was.

Q. Now at the same time—that is, in 1934—Mr. Nicodemus, did your firm receive an appointment as general counsel to the Western Pacific Railroad Company, the subsidiary of the Western Pacific Railroad Corporation? A. Concurrently.

* * *

Q. (By Mr. Adams): Now, Mr. Nicodemus,

(Testimony of Frank C. Nicodemus, Jr.)

ever since 1934, have you made it a practice to attend the meetings of the board of directors of the plaintiff corporation?

A. Very regularly.

Q. Have you ever represented the Western Pacific Railroad Company in any matter in which its interest was opposed to that of the plaintiff corporation?

Mr. Phleger: Well, now, I think that is an improper question.

Mr. Clark: We will object to it on the ground it is——

Mr. Phleger: The attorney has just proved that he is attorney for both companies. I think it is irrelevant, incompetent and immaterial. [827]

Mr. Clark: And also it calls for the conclusion of this witness on a matter of law. Both these companies are now in this courtroom.

The Court: You want to know if at any time, while he was attorney for both of them, that he took a position—you don't expect him to answer that, do you?

Mr. Adams: Well, your Honor, he knows the answer to the question; I am just asking the question. I don't want to argue about it. If your Honor wants to make a ruling on it, I will proceed with the next one. Shall I ask another question, your Honor?

The Court: Well, if you think that it is of any great importance to ask the question, ask it. We know what his answer is going to be, but——

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Adams: I am, of course, making a record. It is conceivable that the answer may be another way.

The Court: I will overrule the objection.

The Witness: I would like to have the question read.

Mr. Adams: Would you read the question, please.

(Question read.)

Mr. Clark: Well, may it please your Honor, may the time be specified and limited so far as the objection goes, to the date March 15, 1943, or at last October 11, 1943, when the District Court confirmed the plan which divorced these two companies? [828]

The Court: Well, you may have lurking in the question an opinion of the witness as to the precise transaction before the Court, if you asked it too generally.

Mr. Adams: Well, I will accept the limitation put upon it by Mr. Clark and ask that the witness answer that question.

Mr. Clark: Well, let us have the question, please. I don't know what the witness understood from my objection.

Mr. Adams: I will state it.

Q. Have you ever represented the company since March 15, 1943, in any matter in which its interest was opposed to that of the plaintiff corporation?

Mr. Clark: Object to that, your Honor, upon the ground it calls for the conclusion of the wit-

(Testimony of Frank C. Nicodemus, Jr.)

ness with respect to an representations during the so-called critical time in this case.

Mr. Phleger: Also it includes this lawsuit.

Mr. Clark: Right.

The Court: It calls for his opinion. You can ask him what he did.

Mr. Adams: I asked him if he represented the company.

The Court: Well, you would have to ask him what the representation was. When you asked him if he ever represented the company in any matter where there was conflict, if the matter in conflict is one of the issues before the Court, that is an answer to that, I think, without asking what he did or what [829] were the matters. I will sustain the objection.

Q. (By Mr. Adams): Now, were you the chairman of a special tax committee of reorganized railroads that was organized in 1943 or 1944?

A. I was.

Q. And what was the general purpose of that committee?

A. Well, the general purpose of that committee was to secure by the passage by Congress of a bill that would give preferred stock that, prior to a reorganization or readjustment, had represented debt, the right to deduct dividends; just as therefore the interest could have been deducted in income tax returns. There was a similar law in effect at that time limited to utilities.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Were you thereafter a member of a second tax committee of the railroads, of which Mr. Atkinson was chairman? A. I was.

Q. And that committee operated during the years 1944 to 1947, or thereabouts?

A. I think it was organized, to the best of my recollection, about October, 1943.

Q. I see. And——

A. And ran on until the legislation was secured from the 80th Congress.

Q. And that was tax legislation relating to the tax positions of certain of the reorganized railroads? [830]

A. That was the legislation that gave a reorganized company that was reorganized under a new charter the same status under the tax law that was enjoyed by corporations such as the Western Pacific Railroad Company, which were able to preserve their charters throughout the reorganizing process.

Q. And do I understand you correctly, Mr. Nicodemus, that the legislation, the need for it, arose because of the decision of the United States Supreme Court in *Helvering v. New Colonial Ice Company*? A. That is correct.

Q. And that decision had to do with whether or not a deduction was a transferable thing?

A. No, the *New Colonial Ice Company v. Helvering* decision was in substance that the reorganized company was a different taxpayer from the

(Testimony of Frank C. Nicodemus, Jr.)

predecessor company, and that these carry-overs and carry-backs only applied to the same taxpayer.

Q. So that it couldn't take the carry-over or carry-back deduction? A. That is correct.

Q. Now, after the railroad company went into reorganization in August, 1935, you continued, did you not, with your general representation of the plaintiff corporation? A. I did.

Q. And you have continued as such up to this date? A. I have. [831]

Q. Did you from time to time give Mr. Schumacher advice as to the problems of the court's trustees in the reorganization?

A. I did from time to time.

Q. And it was the fact, was it not, that your firm was in receipt of a monthly salary from the railroad company while the trustees were operating it? A. That is correct.

Q. That was a continuation of the compensation arrangement pre-reorganization?

A. Yes.

Q. And that was authorized specifically in an early order made in the Bankruptcy Court, according to your recollection; that is true, is it not?

A. My recollection is this: That that was provided for in Order No. 1, signed by Judge St. Sure.

Q. Now, you also became, did you not, at that time the attorney to the debtor in reorganization?

A. I did.

(Testimony of Frank C. Nicodemus, Jr.)

Q. And in speaking of the debtor in reorganization, you have reference to the Western Pacific Railroad Company as the company that filed a petition in reorganization in August, 1935?

A. I was already the counsel for the Western Pacific Railroad Company, and I, with your former partner, Mr. Olney, filed the petition on behalf of that corporation for reorganization under Section 77. Then I continued to be the counsel for the debtor [832] throughout the reorganization proceeding.

Q. Mr. Olney and you jointly signed the petition that was filed for reorganization under Section 77 as counsel to the debtor company?

A. We did.

Q. Yes. And then shortly thereafter, when Mr. Olney was appointed as the attorney to the trustees, he withdrew as counsel to the debtor from that time forward; that is correct, isn't it?

A. Well, at the time of filing of the petition there was no requirement for the appointment of trustees under the Bankruptcy Law, and Judge St. Sure, although it was optional with the court, decided that to appoint a trustee was unnecessary, and that the business would go forward in a corporate form as it had theretofore.

The Court: The debtor remained in possession for a year?

The Witness: No, not as much as that.

The Court: Oh, not that much?

Mr. Adams: The statute was enacted very

(Testimony of Frank C. Nicodemus, Jr.)

shortly thereafter, requiring the appointment of trustees.

The Witness: I think about three months.

Q. (By Mr. Adams): My point is this, and this is the fact, is it not, Mr. Nicodemus: That at the time the trustees were appointed, in November, 1935, and the court authorized the appointment of Mr. Olney as their attorney, he then withdrew [833] as your associate as counsel to the debtor?

A. That is correct.

Q. And from that time forward you alone were the counsel to the debtor in reorganization?

A. That is correct; except that Mr. C. V. Dooling, who was an attorney in the San Francisco office of the Western Pacific Railroad Company, acted as co-counsel for the purpose of signing papers.

Q. Well, Mr. Dooling was an attorney in the law department of the railroad company, is that not the fact? A. That is correct.

Q. And he was like other employees of the railroad company, receiving a salary from the railroad company? A. That is correct.

Q. And his salary was paid by the court trustees after they took over the operation of the railroad? A. That is correct.

Q. The same as your firm salary was paid?

A. That is also correct.

Q. But his name was not on the papers, was it?

A. Not on the original papers.

Q. Nor at any time as counsel for the debtor?

(Testimony of Frank C. Nicodemus, Jr.)

A. Oh, I think so. I think all papers that were filed on behalf of the debtor were filed with his signature, and his address as a local counsel in San Francisco. [834]

Q. To the debtor? A. Yes.

Q. I see. Now, in 1939 the Commission, of course, promulgated its modified plan of reorganization. You recall that?

A. The promulgated plan came out about that time, which was afterwards slightly modified.

Q. Then it was taken to the court here under the procedures prescribed, and it came to the court then?

A. It came to the court automatically under the Bankruptcy Act.

Q. Yes. And thereafter Judge Sloss was designated by the corporation to be the corporation's attorney in the proceedings in reorganization in the court?

A. He was authorized, I think, to intervene in the proceedings and to represent it.

Q. You, however, continued throughout your general representation as general counsel for the plaintiff corporation?

A. In cooperation with Judge Sloss.

Q. And you say "in cooperation with Judge Sloss." Do you mean in respect to the matters in reorganization, you cooperated with him?

A. That is right, that is correct.

Q. And you continued throughout also to act in the capacity of attorney to the debtor?

(Testimony of Frank C. Nicodemus, Jr.)

A. Up through the decision of the Supreme Court. [835]

Q. And continuing throughout the reorganization?

A. And continuing throughout the reorganization proceeding, up to December 31, 1944.

Q. Now, did Mr. Schumacher ever suggest to you that the interests of the corporation in the reorganization should not be fully protected?

A. He did not.

Q. Did you, to the best of your ability, protect the interests of the corporation in reorganization?

The Court: Well, what is the materiality of this phase of the case? There is no point being made, is there, that generally there was any adversity between the interests of the corporation and the debtor during reorganization?

Mr. Adams: There is a contention, your Honor, that the James interests dominated and controlled the plaintiff corporation, its agents and representatives.

The Court: Only with respect to this particular matter.

Mr. Adams: Well, not as I understand it; I understand the interveners' position to be that they propose to show that the James interests dominated and controlled the plaintiff corporation.

The Court: Well, they have presented the facts, the various positions occupied by the various persons, to show that in effect there was a control.

(Testimony of Frank C. Nicodemus, Jr.)

But there is no claim made that there was any dominance in any respect, except that the facts with respect to what was done in the tax transactions—as to what they show.

Mr. Clark: Now, how this transactions was accomplished, your Honor—that is all we attempted to show.

Mr. Adams: Now, just one moment.

The Court: I don't see any point in going back over all the years and finding out what Mr. Schumacher said to everybody connected with the company as to what their duties were as between the corporation and the defendant—unless you feel that some background material is necessary to your case.

Mr. Adams: Well, your Honor, the contention is advanced here and expressed by interveners that the James interests dominated and controlled the plaintiff corporation. It is perhaps that the James interests dominated and controlled the particular transaction only; that, to me, is almost incomprehensible. The question would be domination and control—did it exist or didn't it? The arguments made that the James interests, up until March, 1943, had their financial stake on the corporation's side and after that had their stake on the reorganized company's side—and I have heard those arguments, your Honor——

The Court: Maybe I hadn't thoroughly grasped it, but I didn't think that that word was used in any sinister light, but that it was merely the fact

(Testimony of Frank C. Nicodemus, Jr.)

of ownership that brought about a situation whereby they could have, had there arisen any [837] necessity, secured the accomplishment of such matters as they wished. From a legal point of view, not from any point of view that there was any actual dominance for any improper purpose.

Mr. Adams: But dominance, your Honor, is quite a different thing from the possession of a substantial or even a controlling stock interest. Domination is a fact, whether or not the James interests did dominate these officers and directors.

The Court: But not with respect—not generally speaking.

Mr. Clark: We didn't care about——

The Court: Nobody has raised any such question as that, as I understand it.

Mr. Adams: Well, I don't understand how it can be that you dominate directors of a corporation if you are a stockholder. How could it be that you dominate parties, limiting your dominance to a particular transaction? Isn't it material to show that the directors were independent people, always independent people in all respects?

The Court: That is no more than what we have discussed many times before, that we show a man has always been a good man, so now why should you charge him with doing something wrong at a particular time. Not that that is a particularly happy illustration, but I don't get any contention here in this case made by anybody on behalf of

(Testimony of Frank C. Nicodemus, Jr.)

the plaintiff or the interveners that there was any general domination of anyone [838] in the affairs of these companies, except in connection with this tax matter.

Mr. MacKinnon: Let them put that on the record. Let the interveners put that on the record and get it nailed to one spot for all time.

Mr. Clark: That is the answer to it, your Honor; I put it on the record as many times as we have discussed this particular problem, and no later than last evening, I called attention to the limitation with respect to the allegations of domination in the complaint in intervention which we submitted to your Honor at the pre-trial. Now, the allegations are now, so far as the pleadings are concerned and irrespective of proof, that we contend that in these tax matters the James interests, through Coulson, dominated the plaintiff corporation to advantage the railroad company, of which Coulson was an agent. That is the allegation. Now, the proof adduced in support of that, your Honor, applies only to this transaction and it is the same thing which Mr. Phleger describes as the "taking over by the railroad company." The idea of venality doesn't enter into it at all. The facts are as shown on the prima facie case, that in a situation where Mr. Coulson, who was the tax counsel for the railroad company as well as the corporation, representing both of them, it being to the advantage of another of his clients whom he

(Testimony of Frank C. Nicodemus, Jr.)

represented, the James interests, whose stake was in the railroad company, to [839] advantage the railroad company, does what? His partner, Polk goes not to the directors here, but to Mr. Curry.

The Court: Well, I just don't recall any testimony that has been offered in this case that indicates in any way, or from which any inference could be drawn, that there was any dominance exercised in any way at any time, except in connection with the tax matters.

Mr. Phleger: That is our position and that is all the proof shows.

Mr. MacKinnon: I understand now the record is clear that if the interveners have taken a contrary position, that they are now on record that that is all they are charging.

The Court: Well, irrespective of what, they contend, that is all the evidence that is here shows. There is no evidence that at any time any director of the corporation was ever asked to do anything or perform any function in accordance with the directions of the James interests or anyone else who controlled the railroad company at any time, except in connection with these tax matters. I don't know of any such evidence otherwise. I notice that Mr. Adams very meticulously this morning, in connection with the testimony of Mr. Osborn, went over all these matters to point out that at no time was he asked to do anything by anyone. But no one made any claim that anybody was asked to do anything of that nature at any time during

(Testimony of Frank C. Nicodemus, Jr.)

the time during the time that such a person was acting as a director [840] of one or both of these companies. I don't recall any such evidence.

I don't want to be in a position of cutting off anything that you think is necessary to the defense, but I just don't see that there is anything involved in that.

Mr. MacKinnon: Well, that is all we are interested in, getting the record clearly shaped as to what we have to meet.

The Court: If there is any doubt about it, why, I merely asked this question as to whether or not there is any need for this kind of testimony.

Mr. MacKinnon: I understand your Honor's position, but this is the first time I have heard the interveners take the clear-cut position on the record, and I tried to force them yesterday to do it.

Mr. Clark: Why, we have, from the pre-trial, your Honor. The evidence speaks for itself, and the allegations are very clear in the case. [841]

* * *

Q. (By Mr. Adams): Mr. Nicodemus, when did you first meet Mr. A. C. James?

A. I knew Mr. James slightly for many, many years, but I first got to know him in 1934.

Q. When did you first meet Col. Coulson?

A. 1932.

Q. Were either you or your firm, Pierce & Greer, ever retained to do any legal work for A. C. James individually or any of the James companies or James Foundation of New York?

(Testimony of Frank C. Nicodemus, Jr.)

A. Never.

Q. Were you or your firm ever retained to do any legal work for the firm of Whitman, Ransom, Coulson and Goetz or for Col. Coulson?

A. Never.

Q. As counsel for the plaintiff did you ever receive any directions or instructions from Mr. James? A. Never.

Q. Or from any representative of the James interest? A. Never.

Q. Did you take the directions or instructions of anyone as to what legal advice you should or should not give to the plaintiff corporation?

A. Never.

Q. Were you dominated or controlled in any way in any of your activities as counsel for the plaintiff or as counsel for the [842] debtor?

A. No.

Q. At the beginning of 1943, Mr. Nicodemus, you knew, did you not, the difference between consolidated and separate returns?

A. I did vaguely.

Q. What do you mean when you say "vaguely"?

A. I mean that I was not familiar with the tax law as a tax expert.

Q. What did you understand was the difference between consolidated and separate returns?

A. In consolidated returns the return was filed by the parent, which must be a 95% owner of the subsidiaries that constituted the affiliated group. I think I was aware of that.

(Testimony of Frank C. Nicodemus, Jr.)

Q. You were aware, were you not, in a consolidated return the income, the debits and credits of the members of the group were taken into the return?

A. In a general way I was.

Q. So that losses of one company would offset gains of another in the computation of the tax liability?

A. Correct.

Q. You understood that, did you not?

A. I understood that.

Q. You understood also the separate returns were the separate returns of the individual concerns?

A. I thought I understood that. [843]

Q. Taking into account only their own incomes, debits and so on. It is a fact, is it not, that your employment as counsel for the railroad company terminated as at the end of 1944?

A. December 31, 1944, except as to minor matters.

Q. You did continue to handle a few minor matters which were then in your hands?

A. A few minor matters which were in my hands and one or two still pending, I think.

Mr. Clark: Just one moment, your Honor. I think the evidence shows the employment was by the reorganization trustees, among others, up until December 31, 1944.

Mr. Phleger: The evidence also shows, and the receipted bill is in the record, that the defendant company paid the witness' firm for legal services rendered throughout 1945.

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Clark: As well, yes.

Mr. Phleger: That is in the record, a receipted bill.

Q. (By Mr. Adams): Mr. Nicodemus, the fact is, is it not, that you received a letter from Mr. Elsey, the president of the reorganized company to be, late in December, 1944, which informed you that the reorganized company did not expect to continue with the services of the firm of Pierce & Greer?

A. My answer is my relationship as corporate counsel was terminated as of December 31, 1944, with the reservation that we would continue to handle certain matters that were pending.

Q. That were then pending with you, and you did continue to [844] handle such matters?

A. We have.

Q. And it was as to such matters that you sent special bills to the railroad company which were paid? A. That is correct.

Q. Aside from that you never had any legal representation of the reorganized company?

A. No.

Q. And I take it you have not had any other official office or professional relation to the reorganized company? A. No.

Q. In behalf of the plaintiff corporation you have had in charge, have you not, certain claims against the Railroad Credit Corporation that arose out of the reorganization? A. I have had.

(Testimony of Frank C. Nicodemus, Jr.)

Q. And did your work in the matter begin early in 1944?

A. I think it did. I think it began in November, 1944.

Q. And you have carried that through since to a successful conclusion?

A. Yes, we did, in Maryland courts.

Q. Will you state briefly the nature of that claim.

A. The Western Pacific Railroad Company had borrowed from the Railroad Credit Corporation certain monies aggregated 7,000,000 and it gave as collateral certain securities belonging to it. In addition, the Railroad Credit Corporation demanded that the [845] Western Pacific Railroad Corporation, the parent company, contribute additional collateral to that loan, which is sometimes referred to, and is referred to in the decision of the Supreme Court as accommodation collateral. In the case of the Railroad Credit Corporation that accommodation collateral consisted of advances made by the Western Pacific Railroad Company to a solvent subsidiary of the railroad company, that amounted to \$110,000, I believe, and our conception was the the Railroad Credit Corporation has been made whole out of the collateral provided by the principal debtor, and the accommodation collateral is thereby released, and we prevailed in that contention.

(Testimony of Frank C. Nicodemus, Jr.)

Q. That solvent subsidiary was the Standard Realty and Development Company?

A. Standard Realty and Investment Company.

Q. You have also had in your charge, have you not, a claim by the parent corporation against the Reconstruction Finance Corporation arising out of the reorganization?

Mr. Phleger: May it please the Court, I think this is all utterly immaterial, incompetent and irrelevant. I do not want to be interrupting interposing objections, but it is utterly immaterial. [846]

* * *

The Court: This litigation that you are now questioning the witness about, this employment, took place when?

Q. (By Mr. Adams): The R. F. C. claim—you started investigating that when, Mr. Nicodemus?

A. It was part of my continuous employment as counsel for the Western Pacific Railroad Corporation.

The Court: I mean, when were the activities that Mr. Adam referred to? When did they take place?

A. They started those activities in November, 1944, just before the end of the reorganization.

The Court: And that was litigation in which

(Testimony of Frank C. Nicodemus, Jr.)

the corporation was involved?

Mr. Adams: Yes, your Honor.

Mr. Phleger: And the defendant was not involved. [852]

The Court: And the defendant was not involved?

Mr. Adams: That is correct.

Mr. Clark: Nor any of the substance of this litigation.

The Court: Is there much of this kind of testimony?

Mr. Adams: No, your Honor.

The Court: I will overrule the objection.

(The last question was read by the reporter as follows: "Q. You have also had in your charge, have you not, a claim by the parent corporation against the Reconstruction Finance Corporation arising out of the reorganization?") [853]

A. We have.

Q. And are you proceeding now with that claim, Mr. Nicodemus? A. We are.

Q. Now, you have also had, have you not, with Mr. Osborn, a claim arising out of the reorganization in behalf of the plaintiff corporation, against the Sacramento Northern Railway and against the reorganized railroad company?

A. I would not characterize that as a suit arising out of the reorganization.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Will you please tell the Court what it was.

A. It was a suit on an open account between the Western Pacific Railroad Corporation, the plaintiff in this case, and the Sacramento Northern Railway, a subsidiary of the Western Pacific Railroad Company.

Q. And did you——

Mr. Clark: May we have this particular matter fixed as to time, your Honor?

The Court: Yes.

Q. (By Mr. Adams): You began work on that, did you not, in the middle of 1945?

A. I think so.

Q. And that is litigation in which you, in behalf of the plaintiff corporation, are a participant as its counsel, and in which the reorganized railroad company is an adverse party?

A. That is a correct statement. [854]

Q. And are you still pressing this claim in behalf of the plaintiff corporation? A. We are.

Q. Now, Mr. Nicodemus, have you felt free at all times to assert against the reorganization trustees or against the reorganized company any claim in behalf of the corporation which occurred to you?

A. That is certainly true as against the reorganized company; whether I was ever prepared to present a claim against the trustees in another matter. I was counsel for Mr. Schumacher in his capacity as trustee—I don't think I would have sued him.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Well, you bear in mind, do you not, that the presentation of a claim during the bankruptcy would not have been a suit against the trustees? You had that in mind, didn't you?

Mr. Clark: We object to that on the ground it is a conclusion, and argumentative.

Mr. Adams: I will submit it.

The Court: Well, that would have been an adverse interest, wouldn't it? The man couldn't act as attorney for the corporation and—that is, the reorganized corporation—he couldn't act as attorney of the railroad company, the holding company, the holding company here and also for the trustees in a dispute between them, could he?

Mr. Adams: Oh, but, your Honor, I think that is exactly [855] what he could do, because the trustees were the court's agents and any claim would have been a claim presented to the court.

The Court: I would never let a lawyer appointed in my court in a bankruptcy matter pursue that sort of thing. It is true that the trustees are officers of the court, but they are charged with preserving the res for the benefit of all parties involved, and if somebody asserts some claims that would involve, or have its impact, upon that res, certainly the man that asserts the claim couldn't be represented by the same man who represents the trustee as an officer of the court.

Q. (By Mr. Adams): Well, now, of course, it is a fact, is it not, Mr. Nicodemus, that you never

(Testimony of Frank C. Nicodemus, Jr.)

were an officer of the court as an attorney to the trustees?

Mr. Clark: Well, just a moment. That again calls for a conclusion. The evidence, may it please your Honor——

Mr. Adams: May we have this as an objection, your Honor?

The Court: Yes.

Mr. Clark: Very well, it calls for the conclusion of the witness.

The Court: Ask the question, Mr. Adams, and then I will rule.

Mr. Adams: Yes, your Honor. Would you read the question, please.

(Question read.)

The Court: Well, I think what you want to find out is, [856] was he an attorney for any of the trustees. Is that what you want?

Mr. Adams: Your Honor, what I have in mind to establish is that the attorney to the trustees was another gentleman. He was the lawyer appointed by the court for that purpose.

The Court: Who was that?

Mr. Adams: Formerly Mr. Olney and subsequently Mr. Matthew, occupying those positions.

Q. Now, it is a fact, is it not, Mr. Nicodemus, that you never occupied an official position as attorney to the trustee?

A. I was never the statutory counsel for the

(Testimony of Frank C. Nicodemus, Jr.)

trustee under Section 77 of the Bankruptcy Act.

Q. But it is further the fact that you from time to time, in an informal way, gave advice to Mr. Schumacher about his trustee affairs in New York?

A. Correct.

Mr. Adams: Now, that is precisely the situation.

Mr. Phleger: Well, it was paid for by orders allowed by the Bankruptcy Court.

Mr. Adams: Now, if your Honor please, this is argument and interjection, and if we are going to have objections to my questions, it should be in an orderly form.

Mr. Phleger: He is not stating the evidence correctly, your Honor.

Mr. Adams: May I be heard without interruption for a [857] moment? I perceive that counsel, very appropriately, have in mind that their argument may be presented while I am asking the witness.

The Court: Yes, I think you are right about that. There is a little too much argument, and we are getting away from the evidence here.

Mr. Adams: I thing that there is no question before the Court at the moment.

The Court: I have forgotten now what gave rise to the original objection.

Mr. Adams: The question that your Honor suggested was whether or not the attorney to the trustee would be in a position to present a claim to the Bankruptcy Court against the trustees. Your Honor suggested the question itself.

(Testimony of Frank C. Nicodemus, Jr.)

The Court: Attorneys for the corporation.

Mr. Adams: Well, your Honor suggested, as I understand it,—the question in your mind was—as to whether the attorneys for the court's trustees would be in a position to present a claim in the Bankruptcy Court in behalf of the plaintiff corporation running against the trustees.

The Court: You seem to think that he wouldn't because he hadn't an official position as attorney.

Mr. Adams: And I point out through these questions and answers that he did not occupy that official position.

The Court: Well, nevertheless I don't think that he would [858] urge a claim against a trustee if he were unofficially or in any other way advising the trustee. How could he do that?

Mr. Adams: Well, this is a bankruptcy proceeding, your Honor, and this is a court in bankruptcy, and this gentleman is the general counsel for the plaintiff corporation, whose function it is to look after the corporation's affairs, and who brought into the Bankruptcy Court—take for example, that RCC matter.

Q. You appeared, did you not, Mr. Nicodemus, in the Bankruptcy Court in behalf of the plaintiff corporation, upon the hearing in the RCC matter?

A. I think I did.

The Court: That wasn't against the trustees, was it?

Mr. Adams: That was against the Railroad Credit Corporation.

(Testimony of Frank C. Nicodemus, Jr.)

The Court: Yes, it was against the RCC.

Mr. Adams: That is right, in the Bankruptcy Court.

The Court: But I don't see how the witness could be attorney for, and present a claim on behalf of, the Western Pacific Railroad Company, an adverse claim against the estate, the trust estate, and at the same time be an advisor to one of the trustees. I don't think there would be much argument about that. I don't know whether we are talking about some academic question or whether there is something of this sort involved here.

Mr. Adams: Well, it will develop, your Honor.

The Court: Let us go ahead, then.

Q. (By Mr. Adams): Now, Mr. Nicodemus, do you recall that on or about May 24, 1944, you had a conversation with Mr. Thomas Tarleau and with a Mr. Rapp?

A. I do; but research and examination of my diary and files has developed the fact that this particular conversation occurred November 29, 1924.

Q. You mean 1944? A. Yes, '44.

Q. November 29, 1944?

A. November 29, 1944.

Q. Now, you recall that at the time your deposition was taken you gave some testimony in regard to that conversation? A. I do.

Q. And at that time you fixed the time by relation to your diary and other events, as May 24, 1944? A. That is correct.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Now, will you please state, then, what it is that has brought about a reconsideration in your mind as to the time of that occasion?

A. Why the diary entry—what date did you give, the first date?

Q. May 24, 1944.

A. Oh, that date, I did go down to Washington with Mr. Tarleau on that date, but not with Mr. Rapp, as I remember it. I found [860] out afterwards that I met Mr. Rapp in Washington, so that demonstrated that I was mistaken as to the time when that talk took place, and I was able to communicate with my secretary, my former secretary, who had left me and gone up to Providence, and he came in and went over the files and confirmed that it was November—I think it was November 29—instead of May 29.

Q. Of the year 1944?

A. The year 1944.

Q. Now, you recall when you gave your testimony upon your deposition that you first fixed that time as sometime over a period of a year, but no later than the middle of 1944?

A. I think I did, yes.

Q. And you are clear now that you were mistaken in that regard?

A. I am clear I was mistaken in that date.

Q. And the reason you now fix this date particularly is that this is the only diary entry date that fits an occasion when you talked with these two gentlemen?

(Testimony of Frank C. Nicodemus, Jr.)

A. Oh, no, no. We went further than that. We got a record of the reservations made from New York to Washington and the occupants of the drawing room, and so forth, which establishes in my mind that that took place in November, and that was confirmed by my secretary, who was along with us. I don't think I mentioned that in prior testimony; I had forgotten that he had been there. [861]

Q. Well, now, then, is it your best recollection at this time that the discussion you had with Mr. Tarleau and Mr. Rapp took place November 29, 1944?

A. That is correct.

Q. And who were Mr. Tarleau and Mr. Rapp?

A. Mr. Tarleau, Thomas Tarleau, was the legislative counsel to Secretary Morgenthau until a short time before this conference took place. He had retired from that office and become a partner in a New York law firm, of which the late Wendell Willkie was a senior partner. The name has changed a number of times, and I cannot remember it. He was also a member of this tax committee on reorganized railroads that was working on legislation such as I referred to this morning, that eventuated in the passage of a bill by the 80th Congress.

Q. Now, on the occasion that you and I are talking about, that is the time you went down to Washington on the train with these gentlemen?

A. Yes; Mr. Rapp I haven't told you about.

Q. Oh, please do.

A. Mr. Rapp was formerly the minority clerk

(Testimony of Frank C. Nicodemus, Jr.)

of the House Ways and Means Committee and became a member of the office staff of Simpson, Thatcher & Bartlett, a very eminent law firm in New York.

Q. At a later time?

A. No, at that time, at the time of this conference. [862]

Q. Well, I mean at the time of the conference was he with the law firm?

A. He was with the law firm. And that law firm was counsel for this committee.

Q. So that these two gentlemen, to put it shortly, were tax lawyers who were specialists in tax law?

A. Tax legislation, I think, and tax law, too.

Q. Yes. And you had a discussion with them on the train on the way down to Washington?

A. I did.

Q. And you were on your way down there in connection with work for the tax legislation committee of which you were a member?

A. That is correct.

Q. Now, was it on that occasion, during that trip, that you brought up and discussed with Mr. Tarleau and Mr. Rapp the question whether a loss concern in a consolidated return might have a claim on account of the tax benefits that its loss produced? A. It was.

Q. And you had never discussed that idea prior to that time with anyone, had you?

(Testimony of Frank C. Nicodemus, Jr.)

A. Not that I recall.

Q. You had never discussed it with your partner, Mr. Campbell? A. No.

Q. Or with Mr. Schumacher? [863]

A. No.

Q. Or with Mr. Coulson? A. No.

Q. Or Mr. Polk? A. No.

Q. And so far as you can recall, this was the first time on which you ever discussed the idea with anyone? A. That is correct.

Q. It had occurred to you some time previous to this discussion?

A. Well, it had occurred to me—how far previous, I cannot tell. It grew out of a letter that was written by Mr. Schumacher to Mr. Ehrman back in April, 1943. There was a mention in that letter of a tax saving inuring to the benefit of the Tidewater Southern, and apparently that made no particular impression on my mind at the time. But some time later, and I think quite close to the date at which this talk occurred with Messrs. Tarleau and Rapp, I reread that letter, and it seemed to me that it might have some application to the Western Pacific Railroad Corporation, because it had gone into these consolidated returns, and then had contributed its operating loss, which was a loss growing out of the interest accrued on collateral loans to the Chase Bank and Hanover Bank and Trust Company and the James Foundation. And I raised the question with them as to whether the fact that that

(Testimony of Frank C. Nicodemus, Jr.)

loss was contributed [854] didn't create an equity in favor of the contributing parent.

Q. You are now speaking of this discussion on the train going down with Mr. Tarleau and Mr. Rapp?

A. That is what I understood you to inquire about.

Q. Yes, that's right. Go right ahead. I would like to hear all you recall about that conversation.

A. Mr. Rapp spoke up promptly and said, "No," he didn't think that it would create an equity, that "whoever heard of a tax law that was equitable"; and in his judgment, that the loss would not create an equity. Mr. Tarleau was not as specific or as dogmatic as Mr. Rapp. He said he would probably agree with him. And that is the substance of that conversation.

Q. Well, now, did you express any view yourself with regard to the idea?

A. Well, I was not convinced by their doubts. It still remained in my mind that that might create an equity that would be cognizable in a court.

Q. Did you have any subsequent discussion of that subject with either Mr. Tarleau or Mr. Rapp; that is, prior to the time that the stockholders' suit was instituted in the middle of 1946?

A. No, not that I remember.

The story of that talk with Messrs. Rapp and Tarleau is incomplete unless I tell you that the next day we also had a conference with another lawyer in Washington. [865]

(Testimony of Frank C. Nicodemus, Jr.)

Q. Yes. Please proceed with that. You say "we." But did Mr. Tarleau and Mr. Rapp participate in the conversation you had with Mr. Dudley?

A. I think they were present.

Q. Oh, you do?

A. At least they were present—we were all together, and my best recollection is that Mr. Tarleau left and Mr. Rapp left, to go to their respective appointments. I discussed it further with Mr. Dudley. Mr. Dudley was a Washington lawyer who was on this tax committee, and he said it was a question he hadn't thought of but might have some merit. And I said, "Well, maybe some day it will become a practical question."

Now, that was the substance of my talk with Mr. Dudley.

Q. Now, at the time did you tell these gentlemen that you were discussing this from the point of view of the Western Pacific or any of its subsidiaries?

A. I did not.

Q. You just approached the subject as an academic question?

A. As an academic question, yes, sir.

Q. Now, have you told me the substance of the conversation you had with those gentlemen at that time on that subject?

A. As well as I can remember it.

Q. Now, subsequent to that time, and until the stockholders' suit was commenced in the middle of 1946, did you have any further conversation with

(Testimony of Frank C. Nicodemus, Jr.)

anyone? [866] A. Not that I can recall.

Q. With regard to this question of the possibility of a claim by the loss company on account of the benefits of its loss in a consolidated tax return?

A. What date did you put?

Q. Any time up to the time when, in the middle of 1946, the stockholders' litigation was started.

A. Not prior to the institution of the stockholders' suit.

Q. And now, subsequent to your discussion with Mr. Tarleau and Mr. Rapp and your discussion with Mr. Dudley, did you advise Mr. Schumacher in regard to that discussion?

A. No, I did not.

Q. Did you advise Mr. Coulson or Mr. Polk in regard to it? A. No, I did not.

Q. Or Mr. Curry? A. No.

Q. Or anyone else in the plaintiff corporation?

A. No.

Q. Or did you advise, in fact, anybody about it?

A. No.

Q. Did you talk with your partner, Mr. Campbell, about it? A. Not that I recall.

Q. Now, was that for the reason that it appeared to you at that time that these gentlemen had not indicated that there was such a claim? [867]

A. It didn't occur to me that it was a practical claim at that time.

Q. Now, if you had considered at that time—strike that.

(Testimony of Frank C. Nicodemus, Jr.)

You bear in mind, Mr. Nicodemus, that as at the end of 1944, the trustees' operation of the railroad company came to an end? A. That is correct.

Q. You bear in mind also that the reorganization court remained open for certain purposes until March 1946; you have that in mind, do you?

A. I think that is correct.

Q. Do you bear in mind also that your representation of the railroad company, your official representation of that company, came to an end at the end of 1944? A. That is correct.

Q. Now, was there anything to prevent you from presenting this possible claim of the corporation to the reorganization court if you had desired to do so?

Mr. Clark: Well, now, just a moment, may it please your Honor. I will object to that upon the ground that it is vague and indefinite and assumes something not in evidence or not sufficiently explained—namely, as to what loss is referred to in the question. There is a distinction, as counsel well knows, between the loss which was discussed in these conversations with the witness and the preent stock loss. [868]

Mr. Adams: I will submit it, your Honor.

Mr. Phleger: Well, I will object to it as calling for the conclusion of the witness.

The Court: Well, I think that objection is good.

Mr. Adams: This witness knows, your Honor; he is an adverse witness, I am cross-examining him.

(Testimony of Frank C. Nicodemus, Jr.)

The Court: You can, of course, have a field of inquiry there; you can ask him what he did do, what he did not do, with reference to the loss. But what his relationship was, his company—I think that the question you are asking him is one that calls for the opinion and conclusion on his part.

Mr. Adams: Well, I take it that the objection is sustained to the particular question?

The Court: I think I will sustain the particular objection. I believe you can approach the problem you have in mind in a different way.

Q. (By Mr. Adams): Now, Mr. Nicodemus, it is the fact, is it not, that between the time you had these discussion with Mr. Tarleau, Mr. Rapp and Mr. Dudley, and the time when the stockholders' action was instituted in New York in the middle of 1946, you did not take any further action of any sort in reference to the suggestions that you discussed at that meeting with those gentlemen?

A. No, the whole tax matter was in the hands of Whitman, Ransom, Coulson & Goetz; that was purely an academic discussion. [869]

Q. You took no action yourself of any sort in regard to that matter? A. No.

Q. And you didn't mention it to Whitman, Ransom, Coulson and Goetz or any of its members?

A. No, I did not.

Q. Nor to Mr. Schumacher? A. No.

Q. Nor to Mr. Curry? A. That is correct.

Q. Or Mr. Osborn? A. That is correct.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Or Mr. Wood? A. That is correct.

Q. Nor anyone else? A. That is correct.

Q. Mr. Nicodemus, do you recall that you were asked some questions and gave some answers on this matter on the taking of your deposition?

A. Yes.

Q. May I ask that Mr. Nicodemus' deposition, page 255, be handed to him?

(Handed to the witness by the Clerk.)

Mr. Clark: What page is it, please?

Mr. Adams: 255. [870]

The Witness: I have it. Where do you want me to read?

Q. Beginning five lines from the bottom of page 255, referring to Mr. Dudley. This is a part of your answer (reading):

“Mr. Dudley said that he wouldn't say there was no equity, that he never considered the subject. It was new to him, but it was something worth thinking about.”

Now is it your present recollection that that is what Mr. Dudley said to you at that time?

A. That is my recollection, and it is what I have just testified to in substance, isn't it?

Q. Thank you. Now, Mr. Nicodemus, in an answer to a previous question—you referred to a letter written by Mr. Schumacher to Mr. Ehrman, and I will ask that Interveners' Exhibit 30—I am sorry, your Honor. It will take a moment to produce this document.

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Clark: If you have some of these ahead, may I suggest to the court that it might save time if we could have a few of them and be digging them out of the deposition file here?

Mr. Adams: I had best get along with my own cross-examination, and I can proceed better in this way. I don't think we will have this repeated. If it is satisfactory to counsel, I can proceed better this way. I can hand this to the witness—no, I had better not hand my photostat to the witness.

Q. Mr. Nicodemus, I hand to you a document now marked Interveners' Exhibit No. 30, being a copy of a letter dated April 1, [871] 1943, addressed by Mr. Schumacher to Mr. Ehrman, and I will read it to the witness and his Honor (reading):

“Dear Mr. Ehrman:

“Referring to our telephone conversation last evening, this morning I have looked up our records to see just what the expense of making up the consolidated tax returns in our office and the tax savings effected has been since the Western Pacific Railroad Company went into trusteeship.

“First of all, the certified public accountants, Lybrand, Ross Bros. and Montgomery, were employed by the corporation from year to year to audit the accounts pursuant to the provision of the Securities and Exchange Act. Their charge for this audit has averaged approximately a thousand dollars a year. For the past two years we have consulted them on excess profits tax on a consolidated

(Testimony of Frank C. Nicodemus, Jr.)

basis, and their charge for this was \$150 in 1940 and \$400 in 1941, which was paid by the corporation.

“This work has all been done in this office and consolidated tax returns have been prepared and filed under Mr. Curry’s supervision.

“I might add that during the years the company has been in trusteeship, payment of income taxes for the consolidated group was nil, because of the large consolidated deficits. In fact, the Tidewater Southern, which made a [872] profit every year and was included in the returns, benefited by these deficits, which effected a tax saving to it of approximately \$116,000 for the six-year period.

“During that period expert advice from counsel was not necessary. However, commencing with 1942, the situation was changed considerably because the affiliated companies’ earnings have greatly increased. For that reason, and in view of the new complicated tax law, we now require the advice of competent tax attorneys.

“For your further information, I find that the last payment of consolidated income tax was made in 1929. At that time there was a net consolidated taxable income of \$365,000 on which the income tax amounted to \$40,230.”

(Document handed to the witness by the Clerk.)

Q. (By Mr. Adams): Now, Mr. Nicodemus, is that the letter to which you referred in your testi-

(Testimony of Frank C. Nicodemus, Jr.)

mony about the conversations that you had with Mr. Tarleau, Mr. Rapp, and Mr. Dudley?

A. This is the letter.

Mr. Adams: The record shows, your Honor, that a copy of this letter from Mr. Schumacher to Mr. Ehrman went to Mr. Nicodemus.

Q. And the tax savings, according to your recollection, that [873] you had in mind in November, 1944, when you discussed that matter with those gentlemen, were those Tidewater Southern tax savings that are mentioned in this letter of April 1, 1943?

A. Well, tax savings that I had in mind at that time were the tax savings that grew out of the income accruals of the Western Pacific Railroad Corporation during that tax period.

Q. During what tax period?

A. The tax period in which this letter relates. This is a prior tax period. This is a historical reference to a prior tax year.

Q. Is it your recollection, then, that at the time you had this conversation with Messrs. Tarleau, Rapp and Dudley in November, 1944, that you only had in mind this letter written a year and a half before that date with regard to the Tidewater Southern? A. That is correct.

Q. I will ask that you turn to page 1091 of your deposition. A. I haven't got it.

Q. Oh, it is in another volume from the one you have before you. Do you have that before you now, Mr. Nicodemus? A. 1091?

(Testimony of Frank C. Nicodemus, Jr.)

Q. Yes. A. I do.

Q. May I read certain questions and answers?

A. Yes. [874]

“Q. Do you recall that you testified in your discussion with Messrs. Tarleau, Rapp and Dudley the tax savings that you had in mind was a tax saving arising out of the 1942 return?

“A. Yes, the operating loss.

“Q. That is to say, those were the tax savings?

“A. That is what I had in mind.

“Q. Those were the tax savings for that year to which Mr. Polk referred in his letter of May 20, 1943, were they not?

“A. Yes, they were, that is correct.

“Q. So that then you had in mind that portion of Mr. Polk's letter of May 20, 1943, in which he referred to the 1942 returns?

“A. That is correct.

“Q. Did you at that time have in mind that portion of the same letter in which he referred to the possibility of a loss being taken on account of the corporation's loss on the stock of the company?

“A. No, I did not.

“Q. Is it clear in your own mind at this time that you had in mind one specific part of that letter and did not have in mind another specific part of it?

“A. It is clear in my mind that I had in mind only savings that he specifically referred to in that letter and which were also referred to in the letter of April 1.” [875]

(Testimony of Frank C. Nicodemus, Jr.)

Q. Now, you recall that I asked you these questions and you gave those answers at that time?

A. Probably I did, and I readopt them.

Q. Are they correct now, according to your best recollection?

A. According to my best recollection.

Q. Is it not a fact, Mr. Nicodemus, that the tax savings for the year 1942 that are mentioned in Mr. Polk's letter with relation to the returns for that year are stated in his letter in an amount somewhat in excess of a million five hundred thousand dollars?

A. Yes, they are.

Mr. Adams: That is the letter of May 20, 1943, your Honor. Plaintiff's Exhibit 50 in the case.

The Witness: Only a very small part of that was applicable to this loss of the operating company—I mean the parent company.

Q. (By Mr. Adams): Well, is it a fact that at the time you had your discussion with Messrs. Tarleau, Rapp and Dudley you did at that time have in mind Mr. Polk's advice, his letter of May 20, 1943?

A. I think this correspondence back in the spring of 1943 was perhaps in my mind, but I do remember specifically that letter of April 1.

Q. Now, Mr. Nicodemus, at the time your deposition was taken you were asked when it was that you, according to your recollection, first heard about the use of the corporation's stock loss [876] in consolidated income tax returns filed with the parent corporation?

(Testimony of Frank C. Nicodemus, Jr.)

A. I believe I was asked about that.

Q. I will ask you the same question again. What is your best recollection as to the time when you first heard about that matter?

A. About the stock loss?

Q. About the use of the stock loss. Let me put it this way: You know now, of course, do you not, that the stock loss was a deduction in the consolidated return for 1943?

A. I do.

Q. And that it operated there so that no taxable income was reported for that year?

A. I understand that.

Q. And you know now that the stock loss was a very large sum, something like \$75,000,000?

A. I do.

Q. And that the taxes that have been accrued until they were reversed for the trustees amounted to something over \$7,000,000? You know all those facts presently?

A. Oh, yes.

Q. When was it, Mr. Nicodemus, according to your best recollection, that you first heard about those matters?

A. The first time I ever heard of the stock loss, to my best recollection, was in the last month of 1945, or the first or the [877] second months of 1946, when I was told so by Robert E. Coulson.

Q. Now, Mr. Nicodemus, I would like to review with you a number of things.

Your Honor, Mr. Nicodemus is aware of this because we did this on his deposition before, your

(Testimony of Frank C. Nicodemus, Jr.)

Honor, and it will take a little time because I have various documents and records to put before him, with two things only in view: one to show notice, regardless of knowledge, and the other to present to Mr. Nicodemus documents, some of which he did not see upon the taking of his deposition, that may possibly result in some recollection he does not now have, and I say that because I know it is going to take a little time and I will go right ahead with it.

Mr. Phleger: May I interrupt at this moment? I have not made an objection to this line of testimony. It is our view that the notice, knowledge, action, inaction of this witness can have no possible effect to destroy any claim which the plaintiff might have, and as a result this entire line of questioning is incompetent, irrelevant and immaterial. I would like to have our objection noted to this whole line. I have not made it before, but that is our conception of this case.

Mr. Clark: The intervener enters the same objection, your Honor.

Mr. Adams: I take it, your Honor, this must be cross-examination and I would submit that it is a material question, namely, according to his best recollection when did he hear [878] about these returns? Your Honor said everything was open and aboveboard in this transaction.

Mr. Clark: No, I think he testified when he first heard about the stock loss.

Mr. Phleger: I would like to bring this out:

(Testimony of Frank C. Nicodemus, Jr.)

This is no part of our case. We did not open the subject of notice or knowledge to Mr. Nicodemus. This is the defendant's affirmative case, and our position is it is utterly and absolutely immaterial what this witness knew or did not know, what he did or did not do.

Mr. Adams: Shall I proceed, your Honor? There is no question before you.

The Court: No, there isn't any question.

Mr. Phleger: There is an objection to this whole line of testimony.

The Court: You stated you wanted to show some documents to the witness that may cause him to make some change in his testimony as to when he did or did not have notice of the use of this stock loss as a part of the return. You say that is going to take a long time to do that?

Mr. Adams: It will take some time. There are a number of documents. I do not think it is going to take what might be termed an extensive time, and a day or anything like it.

The Court: Some of the trial judges seem to be getting—I guess we are all affected by it—getting overcautious in [879] permitting evidence to go in, in view of some of the decisions of the higher courts. I have been leaning that way in this case because obviously you have spent a lot of time and know so much more about this case than it is possible for a judge to learn about it in the short time of the trial. I do not see that when this witness

(Testimony of Frank C. Nicodemus, Jr.)

learned about any of these things has any relationship to the question that you are presenting here. I gather you have something more than what was stated in the opening arguments that is a very much more vital question which bears on this matter, and that any such matter as whether this witness learned about it six months ahead of time or what he learned about it I think is incompetent, irrelevant, and immaterial, Mr. Adams. What I am saying about the matter does not indicate that I am in favor of the plaintiff's side of the case at all, but you know your own case best now. If you think this is some vital matter that you have to pile up a big record on matters that really do not bear on the issues of the case, that is all right. There are a lot of big lawyers involved in this case. You have spent a lot of time studying it. You want to throw it all in before the judge. I do not see that it helps me to decide this case. I would much rather hear your arguments and all the arguments on the important and vital issues of this case than all this stuff about what conversations this witness had with some lawyer on a train going to Washington. That is not going to make any difference in my decision of the case. I am more [880] anxious to hear what your arguments are on the vital questions. If you think it is important to put all this stuff in the record, I will allow it.

Mr. Adams: Your Honor, I will state briefly why we think it is important. We think this evi-

(Testimony of Frank C. Nicodemus, Jr.)

dence goes to matters of defense and the effectiveness of the bar of reorganization for the reason that we apprehend that some contention may be addressed to your Honor that the gentlemen who could have spoken for the plaintiff corporation while Judge St. Sure's court was open for hearing claims, that those gentlemen were uninformed about this matter, and this testimony just given is testimony along that line. Now, we do not think we have to disprove what the witness says, but we do think we have to show he had adequate notice. He was one of the representatives of the corporation. We believe this is material and relevant to the defense we present of the bar of the reorganization proceeding. I am sure it has nothing to do with the merits of the claim on the side of the merits. I think it has a material bearing upon the defense of the bar.

Mr. Levy: I would like to say one word in connection with that. Your Honor will remember that we are dealing with split personality and Mr. Adams is seeking to impute to this man considerable knowledge. If your Honor will recall, if there was such knowledge it was equally imputable to his two other clients, namely, the trustees, under whom he had a retainer—call it a [881] salary if you wish, but it was a retainer for legal services—and secondly, the debtor company for whom he was the attorney, and thirdly, the reorganized company, for whom he acted as attorney during the year 1945. However

(Testimony of Frank C. Nicodemus, Jr.)

much Mr. Adams may seek to minimize the nature of services which were rendered, the fact does remain that this man was the attorney for whatever services he rendered for this reorganized company through the year 1945 and was paid for it.

Mr. Adams: I think that is quite immaterial. Your Honor, it is now a little past three o'clock. I will prepare to go right ahead with this. If your Honor considers I should make an offer of proof, I can do that. I do think it is a necessary part of my record and I am prepared to make the offer of proof or to take it up with the witness as your Honor may decide.

The Court: Let me ask you this question, Mr. Adams: How many witnesses do you have in mind at this time that you are going to call in this case? How long do you think the presentation of evidence will approximately take? [882]

* * *

Mr. Adams: Your Honor, at this time I will offer as Defendant's Exhibit 11 the document that I read into the record, being the letter from Mr. Schumacher to Mr. Ehrman of April 1, 1943.

Mr. Clark: Previously marked as what, Mr. Adams?

Mr. Adams: As Interveners' 30. [883]

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 11.)

(Testimony of Frank C. Nicodemus, Jr.)

Q. (By Mr. Adams): Mr. Nicodemus, there is in the record here an exhibit representing certain payments you received as compensation as attorney to the debtor. Is it the fact that all compensation you received as attorney to the debtor was allowed upon orders of the Interstate Commerce Commission and the bankruptcy court?

A. That is correct.

Q. Did you recommend to Mr. Schumacher that the Whitman, Ranson firm be employed as tax counsel for the reorganization trustees?

A. I did.

Q. And did you have in mind at that time the large earnings that were then being earned upon the railroad properties in the hands of the trustees?

A. I did.

Q. Do you recall that there was a conference in your office with Mr. Polk and others on May 18, 1943, with regard to income taxes for 1942?

A. I remember a series of conferences. I think one of them was May 18.

Q. Do you recall that that conference took place shortly after the returns for 1942 had been filed?

A. That is correct.

Q. Do you recall what took place at that conference? [884]

Mr. Phleger: Excuse me. You mean the tentative return?

Mr. Clark: No, the final return was filed on May 15, 1943.

(Testimony of Frank C. Nicodemus, Jr.)

The Witness: My recollection of what took place at that conference was that Mr. Polk explained to me, and which he had previously explained to me briefly, why he thought it was desirable to file consolidated returns, and there was some memorandum which he produced at that conference that was the subject of discussion, more with Miss Valouch and Mr. Curry than with me.

Q. Miss Valouch and Mr. Curry were also present at this conference?

A. They were also present, and I believe that Mr. Reilly was.

Q. At that conference was there a discussion about the possibility of using the stock loss in the following year's return?

A. All I think that was adverted to at that conference——

Q. Do you have a recollection of discussing that matter at that time?

A. It is pretty hard for me to say at this late date. There was a document shown to us in that conference that did refer to it.

Q. Is it your best recollection at this time that at that conference on May 18, 1943, you did hear that there was a possibility of using the stock loss in the following year's return?

A. I think there may have been some reference to it, but I did not charge my memory with the details of that conference. [885]

Q. Did you thereafter receive a copy of Mr.

(Testimony of Frank C. Nicodemus, Jr.)

Polk's letter of May 20, 1943, Plaintiff's Exhibit 50, if you please, Mr. Clerk?

A. In due course I received a copy of that letter from Mr. Curry.

Mr. Adams: The Clerk may hand the document to you.

Q. Now, did you read the letter, Plaintiff's Exhibit 50, at or about the time you received it, May 20 or 21, 1943?

A. Did I read the letter addressed to Mr. Curry?

Q. The letter of May 20, 1943, Plaintiff's Exhibit 50. There is also in the record a letter of May 21, 1943, addressed to you by Mr. Curry transmitting a copy of Plaintiff's Exhibit 50. Do you recall that you read that at or about its date?

A. I recall receiving that and I undoubtedly read it. How carefully I read it I am not able to say at this late date.

Q. Then did you thereafter discuss it with Mr. Schumacher, according to your best recollection?

A. I don't remember having discussed it with Mr. Schumacher.

Q. Now, you met with Mr. Schumacher very frequently, did you not, Mr. Nicodemus?

A. Very frequently.

Q. You were in his office almost as a matter of daily meetings during the time he was one of the trustees of the Western Pacific?

A. I was in his office very frequently.

Q. And did you discuss tax matters with him from time to time?

(Testimony of Frank C. Nicodemus, Jr.)

A. I never recall discussing tax matters with him. [886]

Q. You have no recollection of any such discussions? A. No.

Q. The record shows, Mr. Nicodemus, that early in January, 1944, the tax accruals of the railroad's properties are reversed, and you know about that now; we have mentioned it?

A. I know about that now.

Q. Did you receive regularly during that period the forms 174 revised issued by the Western Pacific Railroad Company, their monthly operating statements? A. Will you produce one?

Q. Yes, I hand to you 174 revised for December, 1943, marked Interveners' Exhibit 424A and ask that it be stipulated that this document was produced from the files of Mr. Nicodemus.

Mr. Clark: I am not sure of that. I think probably it was produced from the railroad company's files, Mr. Adams.

Mr. Adams: That is not my recollection. However, I do not think I will need the stipulation.

Q. It is a fact, is it not, Mr. Nicodemus, that you regularly received form 174 revised during that period?

A. I received from time to time financial statements sent to me by Mr. Curry, usually with my name on it in pencil. I do not remember whether it was green or blue. But such statements that came into my office currently and were filed for such future reference as might be necessary.

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Adams: May I read, if your Honor please, from page [887] 1157 of Mr. Nicodemus' deposition?

Q. Do you have the deposition before you?

A. Some part of it. No, I have not.

Q. Page 1157, Mr. Nicodemus. A. 1157?

Q. Yes. Do you have the page? A. I do.

Q. Mr. Nicodemus, this question is by me, about ten lines from the top of the page.

A. I see it.

“Q. Referring to this file, Mr. Nicodemus, do you recall these printed forms on form 174A revised were received regularly by your office?

“A. They were produced from my files and I will adopt them as documents that were sent to me currently.

“Q. And you are familiar, are you not, with the fact that such monthly statements on form 174A revised were made by the Western Pacific Railroad Company? A. They were.”

Q. Did you give those answers to those questions at that time?

A. I undoubtedly did and I readopt the documents as having been taken from my files.

Q. Referring to form 174A revised, which you have in your hand, for December, 1943, that form shows, does it not, the reversal of the tax accruals of the Western Pacific Railroad Company in [888] a very large sum?

A. Can you indicate the line it is on?

(Testimony of Frank C. Nicodemus, Jr.)

Q. "Railway tax accruals, federal income." You will find that just below the net revenue railway operations. Do you find that?

A. I see a heavy black figure.

Q. \$6,759,886.13? A. Yes.

Q. You understand, do you not, that the black figures are minus figures?

A. I do not so understand. Ordinarily it is red, but if you say——

Q. Will you read the note, Mr. Nicodemus, at the bottom of this form 174A?

A. "Black face figures indicate entries in the reverse of the item as shown on the left hand column."

Q. Yes.

A. Apparently this is intended as the equivalent of a red figure.

Q. You were familiar with these forms, were you not?

A. I was when they were coming into my office currently.

Q. Do you recall whether at or about the time this form came in that it came to your attention?

A. I do not.

Q. Now then, the record shows, Mr. Nicodemus, that on or about February 21, 1944, a petition was filed in the reorganization [889] proceedings requesting authority to establish a reserve fund for contingent tax liabilities. I hand you a copy (handing document to witness).[889A]

(Testimony of Frank C. Nicodemus, Jr.)

Q. Now, as counsel for the debtor, Mr. Nicodemus, you received copies, did you not, of all petitions filed in the reorganization proceeding?

A. I did.

Q. And did you or Mr. Campbell make it a practice to read the petitions and orders that were filed in that proceeding?

A. They were referred to Mr. Campbell ordinarily, and he called my attention to anything that he thought was of special significance.

Q. Do you have any recollection of reading this particular petition? A. I do not.

Q. I hand you a copy of an order authorizing establishment of a reserve fund for contingent tax liability, made March 3, 1943, by the United States District Court. (Handed to witness through clerk). Your office received, did it not, all copies of orders as they were made from time to time in the bankruptcy proceeding? A. Yes.

Q. Do you recall seeing a copy of that order?

A. I do not; but I adopt it as an order which came to my office in the regular course of business.

Q. Do you recall looking at it at the time it came? A. No, I do not.

Q. Do you have any recollection of discussing with Mr. [890] Schumacher or Mr. Curry or anyone else, the reserve fund of \$7,100,000 that had been set up?

A. I do not. I have no recollection of ever discussing that with Mr. Schumacher.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Or with anyone else prior to the time that you spoke of, along at the end of 1945 or the beginning of '46? A. That's right.

Q. Is that right? A. That is correct.

Q. Now, you have read the 1943 annual report of the company, have you not, Plaintiff's Exhibit 20-B?

A. I received the annual reports in the regular course of business at the time they were issued.

Mr. Adams: May I ask that Plaintiff's Exhibit 20-B be exhibited to the witness, and I direct his attention to page 6. And at this time, your Honor, while the witness is looking at that page, may I offer as Defendant's Exhibit 12 the copy of the petition?

Mr. Phleger: That is already in evidence.

Mr. Adams: Is it? Will you give me the designation?

Mr. Phleger: I will find it here. We put it in.

(Plaintiff's Exhibit 20-B handed to witness by clerk.)

Mr. Adams: I am advised that the petition is in, not the order.

Mr. Phleger: Just a moment. I will give it to you. [891] Plaintiff's 58.

Mr. Adams: Is what?

Mr. Phleger: The petition to establish reserve fund for contingent tax liability, otherwise Interveners' 447-B.

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Adams: I offer the order as Defendants' Exhibit 12.

(Order establishing fund referred to above was received in evidence and marked Defendants' Exhibit 12.)

Q. (By Mr. Adams): Now, Mr. Nicodemus, directing your attention to page 6 of the report of the Western Pacific Company, "T. M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization, for the calendar year ended December 31, 1943," on page 6—— A. Page 6?

Q. Yes. Do you have it before you? I direct your attention to the statement there under the heading "Taxes," and I read a portion of it as follows:

"Owing to an unusual situation resulting from the recent final confirmation of the plan of reorganization, no accrual was set up in respect of Federal income and excess profits taxes for 1943. Since 1916, Federal tax returns of this company have been made through a consolidated return filed by the parent holding company, the Western Pacific Railroad Corporation, which parent owned all the capital stock of its subsidiary, the Western Pacific Railroad Company. [892]

"The confirmed plan of reorganization for the railroad company characterizes the capital stock owned by the holding company as being 'without equity or value.' A consolidated tax return

(Testimony of Frank C. Nicodemus, Jr.)

for 1943 can and will be filed by the holding company.

“Tax counsel has advised that the holding company’s loss on its stock of the railroad company will result in an elimination of the liability of the holding company for Federal income taxes for the year 1943, and therefore indirectly eliminate such taxes for the subsidiaries of the holding company.

“However, pending a final settlement with the Treasury Department, the reorganization trustees, by authority of the court, have set aside a contingency reserve tax fund of \$7,100,000, invested in United States Government Treasury savings notes—Series C.”

And I direct your attention to what I have just read, and I will ask you if, at or about the time you received that report, you examined that statement.

A. I have no recollection of ever having read that statement. If I did read it, it left no impression on my mind. The reason perhaps being that tax matters had been referred to the firm of Whitman, Ransom, Coulson & Goetz, and were not my responsibility. [893]

Q. Would you say now that you are sure whether or not you saw that statement I have just read at or about the time that it was published?

A. I am sure that that made no impression on my memory. I have no recollection of having read it.

Q. You have no recollection one way or the

(Testimony of Frank C. Nicodemus, Jr.)

other, is that your statement? I am trying to find out the fact.

A. No, that is not my statement. I have no recollection of ever having read it.

Q. It is the fact, is it not, that you from time to time have referred to this annual report?

A. I am sure that from time to time I referred to all the reports for statistical information.

Q. Now, you recall that upon your deposition we inquired with regard to certain studies you made in Moody's Manual for 1943, do you not?

A. Yes.

Q. And you recall that at the time of your deposition, I produced for you the Moody's Manual for that year, which is the large volume?

A. That is correct.

Q. Manual of Steam Railroads?

A. That is correct.

Q. And that I directed your attention to the statement therein about the Western Pacific Railroad Company? [894]

A. That is correct.

Q. And you recall that that statement set out the facts with regard to this tax matter in much the same form, substantially, as the one that this annual report you have just seen did?

A. I remember that.

Q. You recall that?

A. I recall that.

Q. And is it now your recollection that though you did read Moody's Manual on the Western Pacific for other purposes, you have no recollection of reading that portion of it?

(Testimony of Frank C. Nicodemus, Jr.)

A. That was my recollection, and I should like to add that I examined Moody's Manuals over a series of years for a specific purpose that had nothing to do with taxes.

Q. You examined Moody's Manuals, specifically in that connection—that is, the Western Pacific connection—in reference to this Sacramento Northern litigation? A. That is correct.

Q. That is right, is it not? A. Yes.

Q. Now, then, you received, did you not, the Eighth Annual Report and Account by the trustees of the property of the debtor and petition for approval of their acts and accounts? And I will read a section from page 2, as follows:—

Mr. Levy: What year is that?

Mr. Adams: The eighth report and accounting by the trustees was filed September 25, 1944, in the files in the [895] reorganization proceeding in this court, and there appears in that account, at page 3, beginning line 9:

“The net income as reported for 1943 did not reflect accruals for any Federal income or excess profits taxes in respect of 1943. The trustees have been advised and believe that the debtor and trustees have no liability for such taxes. Pending a final settlement of the question with the Commissioner of Internal Revenue, a reserve fund for contingent tax liability was established by order of the court, dated March 3, 1944, in the amount of \$7,100,000,

(Testimony of Frank C. Nicodemus, Jr.)

which fund was invested in United States Treasury securities.”

And I hand the document to the witness and ask if he recalls seeing that document at or about the time it was received in his office.

(Document handed to witness through Clerk.)

A. I make the same answer; this document undoubtedly came to me in the regular course of business. It was the report of the trustees, submitted over the signature of Mr. Allan P. Matthew, counsel. There was no special reason why I should scrutinize it.

Q. You have no recollection of seeing that portion of the document? A. I have not. [896]

Q. Mr. Nicodemus, I hand to you Interveners' Exhibit 32-A, and Interveners' 32-B; Interveners' 32-A being a letter from Mr. Curry to Mr. Polk, copy to Mr. Nicodemus, of May 19, 1944; and Interveners' 32-B being an enclosure referred to in Interveners' 32-A. Now, the enclosure is a letter of May 17, 1944, from Robert L. Whittaker & Co., addressed to Western Pacific Railroad Corporation, 37 Wall Street, New York, saying:

“Gentlemen:

“It has occurred to us as holders of Western Pacific fives, due 1946, that the large tax credit in the earnings statement for December, 1943, of the Western Pacific, could take place annually for some years to come, as long as the revenue act allows

(Testimony of Frank C. Nicodemus, Jr.)

holding companies to consolidate their returns of subsidiaries for income tax purposes. Since the ownership of the Western Pacific Railroad was declared valueless for 1943, we thought possibly this loss, which must involve upwards of \$50,000,000, could be used as a tax credit for future years until the total loss is used.

“We would appreciate hearing from you regarding this situation.”

And I ask you if you recall receiving those papers at or about that time. That is to say, particularly 32-B.

(Documents handed to the witness by the clerk.) [897]

A. I recall them. I can identify this as a letter that was produced from my files, and I undoubtedly received it at or about the time of its date, and noted that the matter had partly been referred by Mr. Curry to Mr. Polk. Whether or not I examined the letter from Whittaker or not, I can't remember at this late date.

Q. Do you have any recollection that the Whittaker letter, which came to your office and you saw, brought anything to your mind in referring to a tax loss that might be taken over the years?

A. I say, I don't remember reading the Whittaker letter.

Q. You have no recollection of it?

A. I have no recollection of having read it.

Q. Now, I direct your attention to the Inter-

(Testimony of Frank C. Nicodemus, Jr.)

veners' Exhibit 5, which is a letter dated February 21, 1945, from Mr. Curry to you.

But I am getting ahead of myself, your Honor. I should offer it in evidence, and now do offer the two letters just produced as Defendants' Exhibit 13—being Interveners' 32-A and -B.

(Letters formerly identified as Interveners' Exhibits 32-A and -B were received in evidence and marked Defendants' Exhibit 13.)

Mr. Adams: May the witness please have Plaintiff's 5—or, rather, Interveners' 5—no, not Interveners'—— [898]

Mr. Clark: Now, is that Interveners' 5 on deposition or trial exhibit?

Mr. Adams: Yes, Interveners'. I understand this is the trial exhibit. The letter of February 21, 1945, addressed by Mr. Curry to Messrs. Pierce & Greer is what I refer to.

(Handed to witness by the clerk.)

Q. (By Mr. Adams): Mr Nicodemus, your office received this at or about its date, did it not, this letter of February 21, 1945?

A. This is a copy of a letter which I assume I received, or the original, or that the firm did.

Q. Yes. And I direct your attention to the third paragraph of the letter. Is it a fair statement that the first two paragraphs relate to the Delaware franchise taxes of the plaintiff corporation?

A. It is.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Now, the third paragraph reads:

“The question in my mind is whether we should pay these taxes or let them go by default. If we default and our charter is voided, the question arises what would be the effect on the consolidated income and excess profits tax returns filed by the corporation as parent for the years 1942, 1943 and 1944.”

Then the words “To May 1” in parentheses is crossed out. [899]

“As you know, a very large deduction was taken in 1943, which wiped out any tax liability for that year; and will also have an effect upon the 1942 and 1944 consolidated returns. I understand the total tax saving to the Western Pacific Railroad Company will amount to about \$15,000,000. Therefore I feel the payment or non-payment of these franchise taxes must be determined, particularly from the Federal income tax angle.

“I would suggest that before arriving at a decision in this matter, you confer with the firm of Whitman, Ransom, Coulson & Goetz, our tax counsel, who are aware of this situation and are considering the consequences which the non-payment of these franchise taxes would have from an income tax viewpoint.”

Now, do you recall the portion of the letter that I have just read to you?

A. No, I do not, Mr. Adams, and this is a subject that was ordinarily dealt with by my partner, Mr. Campbell.

(Testimony of Frank C. Nicodemus, Jr.)

The Court: That letter was written by Mr. Curry in what capacity?

Mr. Adams: As president of the parent corporation. This is plaintiff corporation's letter to its counsel, Messrs. Pierce & Greer. [900]

Mr. Clark: Suggesting that the matter be referred to its tax counsel, Messrs. Whitman, Ransom, Coulson & Goetz.

The Court: Well, they were also counsel for the defendant, too, at the same time.

Mr. Adams: Whitman, Ransom, Coulson & Goetz had been engaged by the reorganization trustees to handle these tax matters.

The Court: Well, it is certainly much to the advantage of the defendant company to see to it that the plaintiff company maintained its corporate status, in order that the affiliated return might have effect at the time, isn't it?

Mr. Adams: Well, it isn't a question of whether the affiliated return might have effect; I don't think that the corporate existence was indispensable to that, but it certainly meant that as far as the handling of tax matters was concerned, if the corporation should be dissolved, there would simply be some practical impediments in the way of getting trustees' signatures and all that sort of business.

The Court: No, but they were talking about taxes, weren't they, there in that letter?

Mr. Adams: Yes.

The Court: So the only value attached to keep-

(Testimony of Frank C. Nicodemus, Jr.)

ing the corporation alive was so that the effectiveness could be had with respect to the income tax return?

Mr. Adams: Well, I don't think that is true, your Honor; [901] just simply that there was a relationship between the two things.

The Court: Well, what other thing of moment, what other thing of value, was there?

Mr. Adams: Well, Mr. Nicodemus has said that the plaintiff corporation has been a successful litigant in the suit against the RCC.

The Court: Well, it might have some other reasons, but he did refer in this letter, though, to the income tax returns.

Mr. Adams: That is just right, that is just it.

The Court: I don't quite see the purpose of this.

Mr. Adams: To remind Mr. Nicodemus that here is another piece of notice of all these facts in something that came to his office on February 21, 1945, and to inquire if in any way it refreshes his recollection as to his knowledge with regard to that matter. [902]

* * *

The Court: All right. Go ahead, Mr. Adams.

Mr. Adams: Just one or two more items, your Honor. May I have Defendants' Exhibit 17 upon the depositions?

(Handed to counsel by the clerk.)

Q. (By Mr. Adams): Mr. Nicodemus, I show

(Testimony of Frank C. Nicodemus, Jr.)

you Defendants' Exhibit 17, introduced upon the depositions; your letter of [905] September 12, 1944, addressed to Mr. Ehrman. I will read a little part of this. It begins:

"Dear Mr. Ehrman:

"From your letter to Mr. Schumacher, which he was good enough to show me, it seems evident that there is a lack of understanding in San Francisco of the nature and extent of the services rendered and being rendered by our firm as counsel for the Western Pacific Railroad Company. These services are under employment for the railroad company, continued by the trustees. They may be roughly placed in four general categories, which I will set out below, in which seems to me to be the order of their importance."

Then I will pass over No. 1 and 2 as designated here and refer to the paragraph on page 2, beginning:

"3rd. Services rendered in the matter of Federal taxation"—

Mr. Phleger: Excuse me. If you want to refer to this, read the whole letter. It is a fine letter.

Mr. Clark: Or if it is going to be read from, your Honor, may we have it in evidence, and then counsel may read such portions as he wants.

The Court: I take it this is the letter counsel is just going to offer in evidence; is that your wish? [906]

Mr. Adams: Right, your Honor.

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Clark: If it is going to be offered in evidence, all right.

The Court: What was the date again?

Mr. Adams: September 12, 1944. Of course, your Honor can see the whole letter, but I think I am privileged to read a portion, and in the exercise of that privilege I am following the example that has been set here by able counsel.

(Continuing reading):

“3rd. Services rendered in the matter of Federal taxation. All tax returns for the Railroad Company and the Trustees have been made from New York under advice of New York counsel. Owing to the heavily increased tax burdens incident to the war economy, the complex Federal tax structure and the necessity of recurring conferences with the Commissioner of Internal Revenue and the Treasurer, the firm of Whitman, Ransom, Coulson & Goetz, on our advice, were brought in a year or more ago as tax consultants. They are peculiarly well equipped to serve in that capacity.

“The responsibility of New York counsel for the Railroad Company has not, however, been limited to work under the existing tax laws, but has required constant attention to proposed changes that [907] might adversely affect our property. In the last Congress, the so-called ‘Johnson Bill’ was originally so drawn that it would deprive the Western Pacific of the invaluable carry-over and carry-back provisions of the present act. Our firm

(Testimony of Frank C. Nicodemus, Jr.)

prepared and submitted amendments to protect the situation, which Senator Johnson accepted. At the present time legislation is in process of incubation, which, unless the interests of the Western Pacific are guarded, may prove equally embarrassing.”

That ends the paragraph under that heading.

Q. I will ask Mr. Nicodemus if, where reference is made to New York counsel for the railroad company, he refers to his firm; and I will ask that the document be exhibited to the witness.

(Document handed to witness.) [908]

The Witness: Is there any particular part of the letter you want me to read?

Q. I want you to have a fair opportunity to look at it because I will have one or two questions to ask, but if you would prefer me to ask the questions and then look, either way is satisfactory. Shall I ask the question, Mr. Nicodemus?

A. Go ahead.

Q. Directing your attention in particular to the first sentence in that paragraph third that I read, “All tax returns for the railroad company and for the trustees have been made from New York through the advice of New York counsel”—do you find that?

A. That is correct.

Q. Were the tax returns to which you referred in that sentence the returns for the year 1943 and prior years? A. 1942 and prior years.

Mr. Adams: May I refer the witness to his deposition, page 1220?

(Testimony of Frank C. Nicodemus, Jr.)

The Witness: Oh, date of this letter is September 12, 1944.

Q. (By Mr. Adams): Yes. Is your recollection refreshed by that? A. It is, yes.

Q. Would you like to answer again the question I just put? What were the tax returns to which you referred in that sentence [909] of your letter?

A. The tax returns for 1942 and 1943.

Q. Does that refresh your recollection in any way, Mr. Nicodemus, that you were aware at that time of the fact that in the tax returns for 1943 the stock loss of the parent corporation had been taken as a deduction, so that no tax liability was shown in the returns?

A. No, it does not, because the returns were made under the immediate direction of Messrs. Whitman, Ransom, Coulson and Goetz.

Q. Is that the reason why it does not refresh your recollection?

A. And I have no recollection of any discussion as to the 1942 returns—1943 returns.

Q. Mr. Nicodemus, prior to October, 1946—

The Court: This is defendant's 14 now?

Mr. Adams: Thank you, your Honor, yes. I will offer it as Defendant's 14, and perhaps it would be an appropriate time to take a recess. I will have a very brief examination to conclude in the morning. I say very brief; not over a half hour, I think.

(Testimony of Frank C. Nicodemus, Jr.)

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 14.) [910]

* * *

Q. Prior to the time when the stockholders' suit that we have talked about was instituted in New York, in the middle of 1946, the VanKirk litigation, did you ever suggest to Mr. Polk or [911] to Mr. Coulson that either of them had any obligation to advise the corporation of possible claims among group members arising out of the tax returns? A. Prior to that?

Q. Yes.

A. I did not. I assumed under the contract of employment of the firm of Whitman, Ransom, Coulson and Goetz that they were under obligation to advise me of any unusual circumstances connected with the federal tax return.

Mr. MacKinnon: I move to strike out everything after "No, I did not," on the ground it is not responsive.

Mr. Phleger: May I suggest, your Honor, that that is a perfectly proper answer because this is an adverse witness, and the implication of the question is that it was his obligation to have asked them.

The Court: I will deny the motion. The wording of the question was such that I think the answer is not unresponsive.

Q. (By Mr. Adams): Mr. Nicodemus, prior to

(Testimony of Frank C. Nicodemus, Jr.)

the time that this suit began, did Mr. Polk or Mr. Coulson ever refuse to provide you with any information that you requested in connection with the tax transactions?

A. So far as I know, I never requested any.

Q. Your recollection is you never made any requests of them for any information with regard to those matters prior to that time?

A. I assumed the obligation was the other way. [912]

Mr. MacKinnon: I move to strike that out on the ground it is not responsive.

The Court: He has already answered that question. I will strike out the answer on that ground. He has already said he did not make any such requests.

Mr. Adams: Your Honor's point is he has already said that?

The Court: In the previous answer he already said that.

Mr. Adams: As long as the record shows that, that is all I am interested in.

Q. Now, Mr. Nicodemus, do you recall receiving advice in April, 1947, that a settlement proposal had been made to the Bureau of Internal Revenue?

A. I do.

Q. Were you advised of the terms of the proposal? A. I was.

Q. You know, did you not, that the corporation was free to accept or reject the settlement proposal

(Testimony of Frank C. Nicodemus, Jr.)

as it might see fit? A. Restate that question.

(Question read.)

A. I think I did understand that at that time.

Q. Now, considered only from the point of view of settling the claim with the government and leaving out of account any inter-company complaints about the matter, did you consider the settlement was a good one? A. I did.

Q. Was that the judgment of your fellow directors? [913]

A. I can't speak for my fellow directors except that they voted ultimately to accept the settlement.

Q. You were a member of the committee of Mr. Osborn, Mr. Wood and yourself which considered this very matter, were you not?

A. We did. We were a committee.

Q. Did you seriously consider withdrawing Mr. Polk's power of attorney and refusing to go along with the settlement?

A. I do not think that was discussed.

Q. And did the Board of Directors of the corporation finally agree with the settlement and approve it?

A. I think there is a resolution in the record that covers that.

Q. Prior to that time you gave full consideration to the problem, did you not, as to what action the Board of Directors should take?

A. Yes, sir.

Q. And prior to that time you and Mr. Osborn,

(Testimony of Frank C. Nicodemus, Jr.)

with Mr. Goodrich acting in behalf of the corporation, took up and discussed an arrangement to obtain a stipulation which eventuated in a stipulation here in court? A. We did.

Mr. MacKinnon: You had better have the question read back. You referred to Mr. Goodrich.

The Witness: That is correct. Mr. Goodrich testified to it. [914]

The Court: Mr. Goodrich was one of the attorneys at that time.

The Witness: At the present time.

Q. (By Mr. Adams): Mr. Nicodemus, was the Board of Directors of the Corporation at all times aware of the fact that in the reorganization you were acting as attorney for the debtor, and that you were in receipt of compensation from the trustees on a salary basis? A. They were.

Q. Did they know that you were advising Mr. Schumacher as trustee from time to time on an informal basis? A. They did.

The Court: May I ask a question there? You referred to that as an informal basis and some other lawyer said that account was approved in the reorganization proceeding.

Mr. Adams: No, your Honor. As attorney for the debtor—Mr. Nicodemus can tell us about this—I will state it and see if I am right—as attorney for the debtor, Mr. Nicodemus received allowances approved by the Interstate Commerce Commission and by the court.

(Testimony of Frank C. Nicodemus, Jr.)

Q. That is correct, is it not, Mr. Nicodemus.

A. That is correct.

Q. Under the order of Judge St. Sure the firm of Pierce & Greer received a monthly salary payable by the railroad organization in the hands of the trustees, just as it had prior to reorganization. [915] That is a different matter. They received both of those compensations, the firm did. That is right, is it not, Mr. Nicodemus?

A. That is correct.

Q. Prior to June 1, 1943, the firm of Pierce & Greer also received a monthly salary from the parent corporation, is that right, Mr. Nicodemus?

A. I believe it is. [915A]

Q. And then after June 1, 1943, that monthly salary, which by that time had been reduced to some \$416.66 a month, was paid by the trustees in reorganization, whereas prior to that time it had been paid by the plaintiff corporation. I am not sure of my figures, but I am certain of the fact, and I think Mr. Nicodemus will agree that the full compensation of Pierce & Greer, which had formerly been split between the company and the corporation, was taken over by the court's trustees at that date.

Mr. Clark: Some part of it.

The Court: I was asking about it. You had mentioned the fact that this witness was acting informally as attorney for Mr. Schumacher. I recall that one of the attorneys said that that com-

(Testimony of Frank C. Nicodemus, Jr.)

compensation was approved in the Bankruptcy Court. Is that right?

Mr. Phleger: That is right.

Mr. Adams: I think that is a mistake.

Mr. Phleger: Not as a separate item, but they were in receipt regularly of compensation from the trustees for services rendered the trustees, and those accounts were periodically filed and approved by the Bankruptcy Court.

The Court: Is that something different from services rendered to the debtor company?

Mr. Phleger: No, not separately—yes, the debtor in bankruptcy. In that category they received a separate fee, [916] did they not?

Mr. Clark: And allowances.

Mr. Adams: There are three compensations. Now, compensation as attorney for the debtor—and in that capacity, Mr. Nicodemus, the fact is——

The Court: All I was trying to find out is why you were calling these services to the trustees informal. If he represented the trustees and he got paid for the services in the Bankruptcy Court, then he represented them. That is all there is to that.

Mr. Adams: I had better answer that question to your Honor direct. I call it informal to distinguish the formal, the legal representation of the trustees by the counsel appointed by the Court to be the counsel to the trustees. Mr. Nicodemus did not act in that position.

The Court: He was not the court-appointed attorney for the trustees?

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Adams: That is right. That is all I had in mind.

The Court: He represented the debtor, for which he was paid a fee, and he also rendered services to the trustees, is that right?

Mr. Adams: Yes, surely. Yes, indeed, on a monthly basis.

The Court: That was approved and authorized by the Bankruptcy Court, as I understand it?

Mr. Adams: Yes, your Honor, and there is a special [917] bankruptcy order, No. 40, I believe it is, which prescribes in Section 77 proceedings it is appropriate to continue company lawyers.

The Court: It is not unusual in proceedings of that kind where the attorney for the debtor is employed to render services to the trustee in bankruptcy. It sometimes happens, particularly where there is litigation involved and other matters of a special kind.

Mr. Adams: It was only in that sense that I was using the word "informal," and perhaps I can think of a better word to describe this by.

Mr. Phleger: We could think of a better word.

Mr. Adams: That may be the time to speak, because we are going to get into some issues about this.

Q. We were talking about this date, June 1, 1943, Mr. Nicodemus, when the trustees undertook to pay all the expenses of the New York office, including whatever monthly sum your firm had

(Testimony of Frank C. Nicodemus, Jr.)

previously been receiving from the plaintiff corporation. Do you have that in mind?

A. Will you state that again?

(Question read.)

A. I don't understand the question.

Q. I asked you if you had those facts in mind.

A. I wish you would reframe the question. I do not know what the answer is. What facts?

Q. You bear in mind that on June 1, 1943, the salary that your [918] firm had previously been receiving from the plaintiff corporation as its counsel was taken over by the reorganization trustees?

A. I recall that, yes.

Q. And thereafter and until the end of the reorganization, the reorganization trustees paid that salary? A. I recall that.

Q. After that arrangement was made did you still feel entirely free to represent whatever interest of the plaintiff corporation you thought required action on your part as its counsel?

A. I do not know that any question of that kind ever arose in my mind.

Q. Do you have any idea about it one way or the other? If you have, you are on the stand and you can answer.

A. No such question ever arose in my mind.

Q. Do you mean by that, Mr. Nicodemus, that it never occurred to you that that arrangement in any way impaired your ability to act for the plaintiff corporation?

(Testimony of Frank C. Nicodemus, Jr.)

A. No, I had been acting for the plaintiff corporation and for the trustees and for the debtor since the beginning of the proceeding under Section 77 in 1935.

Q. And during all of that time, Mr. Nicodemus, the fact is, is it not, that you felt that you were able to and that you felt that you did represent the corporation's claims to the best of your ability? [919] A. I did, yes.

Q. And that you still thought you were in a position to do that after this arrangement was made on June 1, 1943?

A. I did not think it changed the situation.

Q. Were you aware of the arrangement that Mr. Curry made with the firm of Whitman, Ransom, Coulson & Goetz on or about the 1st of May, 1945, whereunder he was to receive a retainer and have an office in their suite? Do you recall knowing about that?

A. I recall knowing that he was to have an office in that suite, but I do not recall the arrangement and the retainer.

Q. When you say you do not recall that, do you mean you had never heard of it until this time?

A. I never heard of it until the institution of the stockholders' suit.

Q. Is it your best recollection that Mr. Curry did not tell you about that until after the institution of the stockholders' suit?

A. That is my very definite——

(Testimony of Frank C. Nicodemus, Jr.)

Q. That you never discussed that with Mr. Schumacher?

A. That is my very definite recollection.

Q. Do you have any recollection of talking to Mr. Schumacher at the time the New York office closing was under consideration about what would be done for Mr. Curry?

A. No, I do not. [920]

Q. You have no recollection of considering that at all?

A. I can recall no particular discussions on that subject.

Q. Any discussion of it between you and Mr. Osborn?

A. Not that I recall at the present time.

Q. Did you ever suggest to Mr. Coulson that something should be done for Mr. Curry?

A. I did.

Q. When did you do that?

A. Sometime in the fall of 1944 Colonel Coulson told me that he was arranging to take over certain of the employees of the railroad company, that he was arranging for a pension for Mr. Schumacher, but that he did not feel under any obligation to look after Mr. Curry. I told him that I thought that that was rather raw treatment for Mr. Curry, and that he was just as much entitled to a pension as Mr. Schumacher. He said he did not agree with me. He felt no particular obligation to Mr. Curry.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Is it your testimony that you never discussed doing anything for Mr. Curry with Mr. Schumacher at any time?

A. No, I do not recall that I ever did.

Q. You have no recollection of any such discussion?

A. No, but I do recollect this conversation with Colonel Coulson very distinctly.

Q. Yes, and you have told me about that. Have you stated your complete recollection with regard to that conversation? [921]

A. I have, the substance of it.

Q. Yes. Have you anything more to add to it?

A. Nothing to add to it.

Q. Is it your testimony, then, that although you knew Mr. Curry was officing in the Whitman, Ransom suite, you hadn't any idea that he was receiving any retainer from them or from the railroad company? A. No.

Q. Is that your testimony?

A. I learned afterwards that there had been some pension arrangement, but I never heard of this so-called independent contractor arrangement until after this stockholders' suit was instituted.

* * *

FRANK C. NICODEMUS, JR.

Direct Examination
(Resumed)

By Mr. Adams:

Q. May I ask that the transcript of yesterday's testimony be presented to Mr. Nicodemus, and I direct his attention to a question and answer on page 914?

(Court's copy of transcript was handed to witness.)

Q. (By Mr. Adams): Mr. Nicodemus, directing your attention to the testimony beginning two lines from the top of 914, as reported in this transcript:

"Q. You were a member of the committee of Mr. Osborn, Mr. Wood and yourself which considered this very matter, were you not?

"A. We did. We were a committee.

"Q. Did you seriously consider withdrawing Mr. Polk's power of attorney and refusing to go along with the settlement?

"A. I do not think that was discussed."

A. That answer is incorrect. [923]

Q. I did not hear that answer that way, and I wanted to give you a chance to answer it again.

A. That is not correct. The answer is, "I think that was discussed."

Mr. Adams: I have no further questions.

The Court: Any questions by other counsel?

Mr. Adams: Pardon me, your Honor; I think

(Testimony of Frank C. Nicodemus, Jr.)

it would be appropriate, before I conclude this examination, to offer a document which I referred to yesterday, so that if counsel wish to ask the witness or examine this document, it may be on the record upon this examination. I now offer as Defendant's Exhibit 15 a letter from Mr. Ehrman to Mr. Nicodemus of September 14, 1944, written in response to Mr. Nicodemus' letter of September 12, 1944, to Mr. Ehrman, which went into evidence yesterday.

(Letter from Mr. Ehrman to Mr. Nicodemus, dated September 14, 1944, referred to above, was received in evidence and marked Defendant's Exhibit 15.)

Mr. Adams: The letter reads as follows (reading). This is from San Francisco:

"Mr. F. C. Nicodemus, Jr.

Messrs. Pierce & Greer

40 Wall Street

New York 5, New York

My dear Mr. Nicodemus:

"I am in receipt of your letter of September 12 going into some detail in regard to the nature and extent of [924] the services which are being rendered by you on behalf of the Western Pacific Railroad Company and its trustees. I wrote to Mr. Schumacher after you had filed your petition so that if both of us are called by the judge at the hearing on the subject of your compensation, our testimony would be in harmony. I have always

(Testimony of Frank C. Nicodemus, Jr.)

been under the impression that the monthly compensation paid to your firm is the only compensation for which the trustees or the trust estate have incurred any liabilities. Your representation to the debtor company in the reorganization proceedings is, as I view it, a separate matter with which we as trustees are not concerned.

“With kind regards,

“Very truly yours,

“SIDNEY M. EHRMAN.”

And at this time, your Honor, I offer as Defendant's 16 the form 174 revised, operating results and general statistics, the Western Pacific Railroad Company, which I discussed with the witness yesterday, and which is the document upon which appears the item reversing the federal income taxes.

The Court: Has it a date?

Mr. Adams: It is identified at the bottom in print, “San Francisco, California, February 1, 1944,” and at the top, “operating results and general statistics, December, 1943.” [925]

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 16.)

Mr. Adams: I have nothing further.

Mr. Phleger: Mr. Clerk, will you please hand Plaintiff's Exhibit 39 to the witness, or let me have it.

(Testimony of Frank C. Nicodemus, Jr.)

Cross-Examination

By Mr. Phleger:

Q. Plaintiff's Exhibit 39A, Mr. Nicodemus, is a letter on the letterhead of the Western Pacific Railroad Company, 37 Wall Street, New York; T. M. Schumacher and Sidney M. Ehrman, Trustees, dated March 23, 1943, addressed to Mr. F. C. Nicodemus.

"Dear Mr. Nicodemus:

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942. The return filed is a tentative one, an extension having been granted until May 15, 1943, to file a final return. As one of the trustees of the Western Pacific Railroad Company, I am looking to you to cooperate with Mr. Matthew, general counsel for the trustees, in protecting the trust estate in the preparation of the final return.

"Very truly yours,

"T. W. SCHUMACHER."

Did you receive that letter at or about its date?

A. I did. That is T. M. Schumacher.

Q. I direct your attention to the succeeding sheets in Plaintiff's Exhibit 39. 39B is a letter which you wrote to Mr. Schumacher, is it not, under date of March 23?

A. The file handed me shows a letter dated April 20.

(Testimony of Frank C. Nicodemus, Jr.)

Q. 39B is a letter which you wrote to Mr. Schumacher under date of March 23 in respect to the letter I have just read?

A. That is correct.

Q. And in that you suggested the employment of Mr. Coulson's firm as tax experts in this matter?

A. That is correct.

Q. I will not read the succeeding letters but will call your attention to the final letter in the series, being Plaintiff's Exhibit 39F.

A. I have 39F.

Q. That letter reads as follows, on the letter-head of the Ransom firm, under date of April 20, 1943, addressed to yourself, signed by Mr. Robert E. Coulson, reading as follows:

"Dear Mr. Nicodemus:

"This is a belated acknowledgment of your letter of April 8, 1943. I had assumed from its text and from the fact that Mr. Polk and you were already at work when I received your letter that you needed no formal acknowledgment. However, it may be better as a matter of record that you should have a formal acknowledgment of [927] the fact that we have undertaken the federal tax work for the trustees as advisory counsel in conjunction with yourself and Mr. Matthew."

Did you receive the original of that letter at or about its date? A. I did.

Mr. Phleger: That is all.

Mr. Clark: May it please the Court, we have

(Testimony of Frank C. Nicodemus, Jr.)

just one exhibit to offer in connection with Mr. Nicodemus' testimony regarding his employment by the reorganized company after December 31, 1944, and in that connection we will offer in evidence a copy of a letter heretofore marked Interveners' Exhibit 331 on deposition, dated June 8, 1945, addressed to H. E. Poulterer by J. E. Hennessy. Plaintiff's Exhibit 25 already in evidence, your Honor, shows that Mr. Poulterer was the vice president of the defendant company in charge of traffic in San Francisco.

Mr. Adams: That is right.

Mr. Clark: And I would like a concession from you, Mr. Adams, that Mr. Hennessy was the representative of the defendant company in New York in charge of traffic.

Mr. Adams: Well, Mr. Hennessy was a representative of the railroad company. Whatever his description is I am not sure, but that is what you want, isn't it?

Mr. Clark: That is all I want. [928]

Mr. Adams: May I state an objection to this offer, your Honor? This is an offer which relates to certain legal services performed by Mr. Nicodemus and his firm for the reorganized company, but Mr. Nicodemus testified yesterday that he did carry over some legal services, and he did do some work for the railroad company; this is an offer relating to that. My objection is that it is wholly immaterial to any issue in this case. That Mr.

(Testimony of Frank C. Nicodemus, Jr.)

Nicodemus may have had some employment with regard to matters for the reorganized railroad company is wholly unrelated to any matter in issue in this action. I see nothing inconsistent between his carrying on some ordinary work wholly disconnected with any matter in which the corporation was interested, his availability to act in behalf of the plaintiff corporation at all times, nor is there any duality that arises from the employment of an attorney of that sort.

Mr. MacKinnon: I object to it, your Honor, on the ground it is irrelevant and immaterial to any of the years in question and to the issues which I understand your Honor has stated you consider in the action, namely, the tax question for the years 1942, 1943 and the first four months of 1944.

Mr. Clark: May I direct your Honor's attention to the testimony of the witness yesterday which Mr. Adams solicited, and with respect to it this offer is being made, at page 844 of yesterday's transcript, line 2:

"Q. It is a fact, is it not, that your employment as [929] a counsel for the railroad company terminated as of the end of 1944?

"A. December 31, 1944, except as to minor matters.

"Q. You did continue to handle a few minor matters which were then in your hands?

"A. A few minor matters which were in my hands and one or two still pending, I think."

(Testimony of Frank C. Nicodemus, Jr.)

Then there is colloquy of counsel and here is the next question:

“Mr. Adams: Mr. Nicodemus, the fact is, is it not, that you received a letter from Mr. Elsey, the president of the reorganized company, to be late in December, 1944, which informed you that the reorganizing company did not expect to continue with the services of the firm of Pierce & Greer?

“A. My answer is my relationship as corporate counsel was terminated as of December 31, 1944, with the reservation that we would continue to handle certain matters that were pending.

“Q. That were pending with you, and you did continue to handle such matters?

“A. We have.

“Q. And it was as to such matters that you sent special bills to the railroad company which were paid.”

Now, the letter which I am offering, may it please the Court, shows that in the middle of 1945 the company advised Pierce & [930] Greer, or rather people in the company were told that in the event legal process should be served on the company, he was to turn such matters over to Mr. Campbell of the firm of Pierce & Greer. That is the middle of 1945, and we renew the offer. They were not pending matters. They were new matters, and it demonstrates that Mr. Nicodemus' firm was the New York counsel for the reorganized company during the year 1945, just as is demonstrated by the bill Mr. Phleger called your Honor's attention to yesterday,

(Testimony of Frank C. Nicodemus, Jr.)

showing the payment for that year.

The Court: Well, I think counsel's objection goes to the weight of the testimony. I will overrule it.

Mr. MacKinnon: May I be heard on my objection? I don't want to take time on this, because I don't think it is important; but your Honor has stated you perceive the issues in this case to be the tax relationship. That is not the tax relationship, but one year and three months later. Now if that is relevant, then it seems to me we are opening this question wide open.

Mr. Clark: May it please your Honor, the refund claim was filed March of 1945, on March 9. The '44 return was filed as late as June 15, 1945. It is the very time in question.

The Court: Counsel, the witness was interrogated yesterday as to the circumstances under which his employment by the company was or was not terminated.

Mr. MacKinnon: That is right. [931]

The Court: So that you brought that out, or rather, counsel for the defense brought it out. It certainly has something to do with that examination. The objection may be as to the weight of the testimony, but I wouldn't think as to its admissibility.

Mr. Adams: I would just like to state that I offered, or brought it out, because plaintiff has offered in evidence documentary material relating to payments made to Mr. Nicodemus for such purposes.

(Testimony of Frank C. Nicodemus, Jr.)

The Court: It may be admitted.

(Letter of June 8, 1945, Hennessy to Poulterer, was thereupon received in evidence and marked Interveners' Exhibits 17.)

Mr. Clark: That is all from us, your Honor.

The Court: I think that is all.

(Witness excused.) [932]

* * *

Mr. Adams: Reading from page 4570 of the deposition of Willis D. Wood, taken in this action in New York, commencing April 20, 1948.

“WILLIS D. WOOD

“called as a witness by the plaintiff, being first duly sworn by the notary public and stating his address as 635 Park Avenue, testified as follows.”

And then on page 4572:

“Q. In 1898 did you go to work for a different firm? “A. I formed a firm in 1898.

“Q. What was the name of the firm that you formed? “A. Ladd, Wood & King.

“Q. What was the business of the firm?

“A. The same.

“Q. Brokerage business, investment business?

“A. Yes.

“Q. How long did that firm continue?

“A. Ladd, Wood & King were on for about four years, and then Ladd & Wood until about 1924.

“Q. Did you form the firm of Ladd & Wood?

“A. Yes.

“Q. And that was a brokerage business?

“A. Continuing the same business.” [933]

To shorten this, may I ask if counsel will agree with me that then Mr. Wood stated that the name became “Wood, Low & Co.” in 1924 and that firm remained in business until 1941, and that thereafter Mr. Wood became a limited partner in a similar firm? Turning to page 4574, again to shorten the reading——

Mr. MacKinnon: You haven’t gotten your concession.

Mr. Phleger: Yes, certainly.

Mr. Clark: Yes.

Mr. MacKinnon: All right.

Mr. Adams: Mr. Wood’s deposition, page 4574, shows that he is a member of the New York Stock Exchange, becoming such in 1902, and is now and was a governor of the Exchange from 1911 to 1927, and was for eleven years a member of the listing committee. Is that conceded?

Mr. Phleger: Yes.

Mr. Clark: Yes.

Mr. Adams: I am continuing on the following pages. Also, that he has been a director of several corporations, a trustee of the Brooklyn Trust Company, a director of the Corn Products Refining Company, having been a director on that company since 1915, when it was organized; a director of the Fidelity & Casualty Company, on which he has been a director from 1925 to the present date. And

on page 4579, a director of the Missouri, Kansas, Texas Railroad Company from its reorganization in 1923 to his resignation in 1946; a director of the New York Railways Corporation [934] from 1925 to date. That is page 4580. And the following questions and answers on page 4581, beginning three lines from the top of that page:

“Q. Mr. Wood, have you had anything to do with the Seaboard Airlines during its reorganization?

“A. I was the only man who lived through it, thirteen years.

“Mr. Levy: Is that the one that was just completed?

“The Witness: Yes.

“Q. (By Mr. Dickerson): Were you a member of the reorganization committee?

“A. The entire time.”

Now turning to page 4583, I will read from that page, beginning at the top. Question by Mr. Dickerson who was, as your Honor knows, of counsel to the plaintiff:

“Q. Mr. Wood, did anyone ask you to become a director of the Western Pacific Railroad Corporation? “A. Mr. James.

“Q. Do you remember the conversation that you had with Mr. James at that time?

“A. I remember having a conversation with Mr. James, asking me to become a member of the board, surely.

“Q. What was the conversation? Give us the substance of it, if you remember.

“A. The substance of it was that, as a matter of fact, [935] he knew how well informed I was about that district. I had known the properties of the Denver & Rio Grande for ten years before. I saw him continuously, socially, and talked to Mr. James about it. And he knew I went out there every year on the Denver & Rio Grande situation and I knew a good deal about it. And he wanted me to join the board for those reasons.”

Page 4590, question four lines from the bottom of that page:

“Q. Did you know Miss M. C. Valouch?

“A. Same way.”

I had better read above, your Honor, to see what that answer means, I suppose .

Mr. Phleger: What page is that?

Mr. Adams: 4590. At the top of the page, the second line, is this:

“Q. Mr. Wood, did you know Mr. John F. Wienken?

“A. As a director of the board.

“Q. Did you know him prior to the time he became a director of the board?

“A. No, excepting when he was working in the office there.

“Q. This was at 37 Wall Street?

“A. Yes.”

I think counsel will agree that the answer “same way” relates to those answers? [936]

Mr. Phleger: Yes.

Mr. Clark: That’s right.

Mr. Adams (reading):

“Q. You knew her in the office at 37 Wall Street, did you?

“A. Yes, her time wasn’t wholly given to that. I had met her in connection with Western Pacific matters before she became a director. I cannot tell what the occasion was, but I was very happy to see her become a director; I admired her as a person.”

The record shows that Miss Valouch became a director of the plaintiff corporation May 1, 1945.

Mr. Phleger: Which is about the time of this communication that has just been objected to.

Mr. Adams: Well, I am giving the dates, your Honor, and I think that I might proceed without these interpolations.

Page 4666 of Mr. Wood’s deposition:

“Q. Did you know the reputation of Mr. James for fair dealing? “A. Yes.

“Q. What was that reputation?

“A. One of the most generous souls I ever knew. He inherited it from his father. I know, for instance, in Mr. D. Willis James’ will, he provided that his beneficences should not be known until twenty-five [937] years after his death. I knew of the generosity of Mr. A. C. James and it was greater than people ever had any idea.

“Q. And in his business transactions, Mr. Wood, what was his reputation as to fair dealing in his business transactions? “A. The best.

“Q. You spoke yesterday of Mr. James speak-

ing to you about becoming a director of the corporation. Do you recall that? “A. Yes.

“Q. Was it your understanding that Mr. James expected you to exercise your best judgment in your acts as a director?

“A. He wouldn't have asked me if he hadn't thought so.

“Q. Did he ever tell you how to vote on any matter that came before the Board of Directors?

“A. No, sir. I discussed the wisdom of policies with him, but he never attempted any dictation.

“Q. So far as you know, did he ever give you any orders or directions to other directors as to how they should vote? “A. No.

“Q. Did Mr. James ever ask you to favor the James interests at the expense or disadvantage of other stockholders [938] of the corporation?

“A. No.

“Q. Did he ever ask you to do anything which you believed would favor the James interests at the expense or disadvantage of other stockholders?

“A. No.

“Q. Have you, as a director, ever done any act for the purpose of favoring the James interests at the expense or disadvantage of stockholders of the corporation? “A. No.”

Mr. Levy: There was an objection to the form of the question at that time, your Honor, on the ground that it called for a conclusion of this witness and character of his own conduct, rather than a statement of the facts. I should add that while we have not objected to any of what Mr. Adams has

read, your Honor will be mindful that Mr. James died in 1941, so that all Mr. Adams' questions here are directed to a period preceding 1941.

Mr. Adams: That is not true, as to the last question, not accurate, Mr. Levy.

Page 4669, question at the top of the page——

Mr. Levy: I don't think we have a ruling on the objection.

The Court: I don't know whether you are objecting to it or not.

Mr. Levy: Yes, I read the objection as it was stated at the [939] deposition.

The Court: What was the question?

Mr. Adams: "Q. Have you, as a director, ever done any act for the purpose of favoring the James interests at the expense or disadvantage of other stockholders of the corporation?"

The Court: Well, a lot of other questions along the same line were asked heretofore, weren't they?

Mr. Levy: Yes, they have been; just as improperly, I think.

The Court: You didn't object to those.

Mr. Phleger: We haven't objected to many questions that we think are quite improper. We didn't want to delay the trial. I think it is immaterial, your Honor.

The Court: I believe it is immaterial, but I will overrule the objection. I think this line of questioning is immaterial but I will overrule that objection.

Mr. Adams: Page 4669:

“Q. I take it from your testimony that you have known Mr. Schumacher since about 1920?

“A. I think it may have been a little before that, even. I am sure it was before that.”

Then further down, same page:

“Q. After you became a director of the Western Pacific Railroad Corporation, did you then see him frequently? [940]

“A. In the duties of the corporation, yes.”

Page 4674, six lines from the top of the page:

“Q. Do you recall, Mr. Wood, any discussion you had with Mr. Schumacher in connection with the engagement of Mr. Polk on tax matters?

“A. I had Mr. Schumacher in mind, and I had my associates on the board discuss the matter.”

That is the way the transcript reads.

“Q. Do you remember at this time any discussion you had with Mr. Schumacher on that subject?

“A. Not specifically alone, no.

“Q. Do you recall any discussion of that subject with Mr. Nicodemus?

“A. I do not recall any. I would be surprised if I didn't have numerous discussions, but I cannot recall any specific one. They were discussed many times outside of the board room and fully at the board meetings.

“Q. Is it your best recollection that the Board of Directors of the corporation generally knew of the engagement of Mr. Polk in that work?

“A. Yes.”

Mr. Levy has an objection he may wish to state.
Mr. Levy: No, we will pass the objection.

Mr. Adams: Very well. That is all I have from the deposition of Mr. Wood. [941]

Mr. Phleger: I take it this is an appropriate time for us to at this time read from the balance of his deposition?

The Court: Well, whatever procedure you wish to follow; unless you wish to wait until a later time. If counsel is willing, I suppose you might.

Mr. Adams: We are entirely willing; whatever procedure would be most advantageous for the Court's point of view.

The Court: It will be in the nature of cross-examination?

Mr. Phleger: In the nature of cross-examination, yes.

The Court: All right.

Mr. Phleger: 4682, question by Mr. Adams:

"Q. When was it, Mr. Wood, that you knew about the railroad company being freed from the 1943 taxes and the first four months of 1944, and about the railroad company paying the \$4,200,000 for 1942?

"A. The first time I knew anything about the benefit of that position was in my talk with Mr. Nicodemus in the last part of July, 1946.

"Q. Prior to that time, had you heard anything about the railroad company setting up a reserve on account of its not paying income taxes?

"A. No.

"Q. Prior to the time that you had that talk with Mr. Nicodemus, what was your knowledge with

regard to the taxes that the railroad company was paying? [942]

“Mr. Levy: For the years 1942, 1943 and 1944.

“Mr. Adams: Yes, for those years.

“A. I was a director of the corporation. I felt absolutely confident, as I have said before, that it was a corporation without assets, and I felt I was justified in acting as I did. I had had so long an association with the Denver & Rio Grande that I was positive that there was no value in the stock. I felt there was no duty to perform, excepting to approve a pro forma return to take care of the corporation, and that was my whole idea at that time, and I felt that that function was in competent hands.

“Q. Did you know during those years, 1942, 1943, and 1944, that the corporation had deficits?

“A. Yes, of course.

“Q. Did you assume that then the corporation would not have any income tax liability?

“Mr. Levy: I object to the form of the question as calling for an assumption.”

Mr. Levy: Objection withdrawn.

Mr. Phleger: “A. I felt the company was foreclosed, as to preferred and common. The Court acted on March 15, 1943, and after that there was no action necessary on my part, and hence I did not give it the attention that I did in former years. I felt that I did not have to give it [943] the detailed attention that I had formerly given it.

“Q. Was it your understanding that the corporation did not have any taxable income during those years?

“A. I considered it a non-entity. It had no assets; how could it have any income?” [943A]

Mr. Phleger: 4687.

“Q. (By Mr. Adams): Do you recall any discussion with regard to paying the franchise taxes of the corporation?

A. Yes, I do. You mean the Delaware franchise taxes?

Q. Yes, precisely. A. Yes.

Q. Will you state your best recollection as to that discussion?

A. I remember the sum involved seemed to us small, but it was represented, or I recall that I was convinced that it was one of those things that ought to be done, that the corporation was not ready for interment, was not through.

Q. Do you have any further recollection of any further discussion as to why it was desirable to keep the corporation going?

A. No, excepting as I have just stated, I regarded the thing as a pro forma situation for the liquidation of the corporation, which was beyond reviving in my mind as of March 15, 1943.

Q. So far as you can remember at this time you do not remember any discussion with any of your fellow directors that the consolidated returns [944] would be any advantage to the railroad company?

A. No, sir.”

4608, near the bottom:

“Q. (By Mr. Dickerson): As to the 1944 return was there any discussion by the board of di-

rectors at any time concerning the capital loss sustained by the holding company which might be used by the group to avoid taxation?

A. No.

Q. Did Mr. Polk or any other member of the firm of Whitman, Ransom, Coulson & Goetz ever explain to you the possibility that the capital loss sustained by the holding company could be used by the group to avoid taxation?

A. No, decidedly."

That is all.

Mr. Adams: I have some responsive reading from the same deposition. Page 4677 of Mr. Wood's deposition.

"Q. Now, I ask you to state, as well as you can recollect it, what was the discussion with regard to the filing of the consolidated returns for 1943?

Mr. Levy"—

Mr. Levy, do you want me to read this?

Mr. Levy: Skip it.

Mr. Adams: Page 4678:

"Q. Do you bear the question in mind, Mr. Wood? [945]

A. What is your question to me?"

Then the question was read.

"Q. Now, I ask you to state, as well as you can recollect it, what was the discussion with regard to the filing of the consolidated returns for 1943?"

A. There was never a time when I had any question but that the consolidated returns were filed. They were from the start. I do not recall any

specific question debated or referred to. As to questioning the possible desirability of the corporation's benefit, it never occurred to me. I feel that you are pinning me down by trying to make me recall a specific conversation about a specific subject. I do not recall anything of that kind because it was a continual assumption based on fact that those consolidated returns were filed right through. Is that an answer?"

And then on page 4683, two lines from the bottom, and this immediately follows what plaintiff's counsel just read to your Honor.

"Q. So, it was your understanding that for those years the corporation could not possibly have any income tax? A. Absolutely not.

Q. Did you know that the company during those years [1946] had large earnings?

A. The railroad company?

Q. Yes.

A. I knew the progress of the railroad company.

Q. Were you aware that during those years, 1942 and 1943 and 1944, the company was having large earnings?

A. I remember that so well as to feel that an event which occurred in 1931 and which was of great promise for the Western Pacific road, the building of the Klamath Falls division, was beginning to bear fruit many years afterward.

Q. Was it your understanding that any income taxes for those years would be paid by the railroad company?

A. If paid at all, it was the only company that had any money.

Q. And it was likewise, was it not, the company that had the earnings? A. Yes."

Now, if your Honor please, I should like to read from the deposition of William W. Hatton taken in New York on February 19, 1948, in this action, page 712. Your Honor will recall that Mr. Hatton was a director at certain times of the plaintiff corporation, and as in the case of Mr. Wood, I will try to state, without reading the questions and answers, the preliminary statements describing the witness who was called in behalf of the interveners.

Mr. Hatton testified that he was employed at the time of giving his testimony by the Denver and Rio Grande Western Railroad Company with an office at 37 Wall Street; that he had been employed by that company for 25 years; that during 1942, 1943 and 1944 the office of the Denver and Rio Grande was at 37 Wall Street; that his position with the Denver and Rio Grande was assistant secretary and assistant treasurer; and the record shows, your Honor, that that office at that time was the same office occupied by the plaintiff corporation, the New York office we have heard talked of. Now, at page 726 these questions are asked by interveners' counsel:

"Q. Do you remember who it was that asked you to go on the board?

A. I couldn't say. I don't recall.

Q. Do you have any recollection at all on that subject? A. No, only what I think.

Q. What do you think?

A. I think Mr. Curry asked me.

Q. You think it was Mr. Curry?

A. I think, yes.

Q. How long had you known Mr. Curry prior to that [948] time? A. Over ten years.

Q. In what connection, please?

A. In connection with the Denver and Rio Grande being 50 per cent owned by the Western Pacific and more or less under the tutelage of Mr. Schumacher.

Q. To whom you looked up as your superior and chief? A. That is right.

Q. From time to time after September—by the way, Mr. Hatton, what did Mr. Curry do in the office of 37 Wall Street when you were there, and particularly during the period 1942, 1943 and 1944?

A. He was managing head of the Western Pacific. He did not have anything to do with me.

Q. Was he the head of the office there?

A. He was."

Mr. Clark: Mr. Adams, will you please read the next two lines?

Mr. Adams: Oh, surely.

"He ran the office management?

A. Right.

Q. For the Western Pacific, is that right?

A. Right."

Page 728, your Honor, under Examination by Interveners' counsel: [949]

"Q. During the meetings that you attended,

after you went on the board, during the years I have called your attention to, did you take any part in the discussion of various problems that affected the corporation? A. I did not.

Q. At any time did you ever cast a dissenting vote with respect to any resolution that was offered?

A. I did not.

Q. Is it a fair statement, Mr. Hatton, to say that you simply followed the majority of the directors in any decision that they might reach?

A. That is correct.

Q. In other words, you did as you were told?

A. I was not told.

Q. You simply followed the majority?

A. I followed my own judgment as to the proper thing to do.”

Now, turning to page 740, if counsel will permit me I will state Mr. Hatton testified that he never had anything to do with the Western Pacific Railroad Company, that he understood the plaintiff corporation was a holding company in its relation to the Western Pacific Railroad Company. I have nothing further from Mr. Hatton.

Mr. Phleger: I have about four sentences. Page 713. [950]

“Q. What position did you hold with the Denver and Rio Grande Railroad at that time?

A. Assistant secretary and assistant treasurer.

Q. Were there other representatives of that company in the office at 37 Wall Street during that period?

A. Yes, sir. I had one clerk.

Q. What was his name, please?

A. His name was John Wienken."

John Wienken's name appears on the chart there as a director of the plaintiff corporation.

Mr. Adams: At a subsequent time.

Mr. Phleger: Reading on page 714:

"Q. Is it a fair statement to say that your duties during that period at the office at 37 Wall Street was purely clerical? A. Yes.

Q. There were no management problems that you attended to? A. None whatever.

Q. And I take it that you had no discretion to exercise on policy or things of that sort?

A. That is correct.

Q. What salary were you receiving from the Denver and Rio Grande during the period that I directed your [951] attention to, that is, 1942, 1943 and 1944? A. \$4500 a year."

And on page 723: The questions before had to do with an attempt to fix the date when he became a director. The questioning then proceeds:

"Q. Does that refresh your recollection as to the date on which you became a director of the corporation? A. Yes.

Q. Does that accord with your memory?

A. No, I had 1943 in mind.

Q. With regard to the particular incident or occasion when you were invited to become a member of the board of directors of the Western Pacific Railroad Company? A. No, I do not.

Q. No memory on it at all?

A. Just a general hazy memory that they required another board member to bring it up to the legal requirements of the board."

That is all.

Mr. Adams: Your Honor, I will read from the deposition of Katherine C. Sheehan, which appears at page 751 and following, and will state again that this examination, taken on behalf of the interveners in this action, was taken at about the same time as the taking of the deposition of Mr. Hatton. [852]

Mr. Clark: The same day, wasn't it?

Mr. Adams: I think it was; that is right. It shows that Mrs. Sheehan at the time of the taking of her deposition was employed as a bookkeeper by a firm of lawyers in New York having no relation to this litigation, that she was employed in 1942, 1943, 1944 and up to about May 1, 1945, in the office of Mr. Schumacher, trustee for the Western Pacific Railroad Company.

Mr. Clark: The next question and answer does show, Mr. Adams, does it not, that she had been employed in the office since 1932?

Mr. Adams: That is right, yes.

During the period with respect to which she was testifying, specifically during the period 1942 and so on, to May 1, 1945, she was receptionist. She also helped on stock transfer work when the corporation took over that work. Everybody in the office worked on that. Her immediate superior in the office on that work was Mr. Curry. I do not recall where her salary is stated, but I think that

is in evidence now. In any event, if counsel desire the figure, if they will advise me we will put it in. I think it was about \$2000 a year, something like that.

Mr. Clark: That is my recollection. It is on page 757: approximately \$2000 a year.

Mr. Phleger: It is on the chart. [953]

Mr. Adams: Now, page 758, your Honor:

“Q. Do you remember, Mrs. Sheehan, when you became a director of the corporation?

A. Yes, February, 1944.

Q. The record in this case shows it was February 15, 1944. A. That would be right.

Q. Do you remember the particular incident or occasion when you were invited to become one of the directors of the corporation?

A. Yes, I was asked to become a director to fill the board to effect a quorum.

Q. By whom were you asked?

A. By Mr. Curry.”

Mr. Phleger: Would you read the next two lines?

Mr. Adams: Yes, surely.

“Q. Was that while a meeting was in progress?

A. While a meeting was in progress, yes; I was invited in before I was appointed.”

And further down on the same page:

“Q. Am I correct in stating that a gathering of the board had taken place in the board room prior to the time you went in there? A. Yes.”

Mr. Phleger: And the next three lines? [954]

Mr. Adams: Very Good.

“Q. And thereupon you were invited in and asked to be a director, is that right?

“A. That’s right.”

And a question at page 771—no, wait; there is one other first. In the examination by the interveners’ counsel, page 763, beginning at the bottom of page 762:

“Q. During that period that you were a director of this corporation—that is, the Western Pacific Railroad Corporation—Mrs. Sheehan, did you take part in the discussions of any problems that were posed to the board having to do with the corporation?

“A. No, I attended the meetings.

“Q. Did you take part in the discussions?

“A. No.

“Q. Did you ever cast a negative vote or a dissenting vote on any resolution that was offered on any proposition?

“A. No, I don’t believe so. I usually went with the majority.

“Q. You simply followed the majority decision on whatever matter was before the board?

“A. That is right.

“Q. Did you know during that time who the tax counsel [955] for the corporation was?

“A. No.”

Mr. Clark: Well, Mr. Adams, will you develop the rest of that subject so that it will all be before us? The next question and answer.

Mr. Adams: Yes, I will read it if you want. I hadn’t intended to read it, though.

Mr. Clark: Well, it finishes that up, if I may suggest it.

Mr. Adams: Very well.

“Q. Let me mention the name of James K. Polk or Whitman, Ransom, Coulson & Goetz; does that strike any chord of recollection with you as to who represented the corporation in tax matters?

“A. Well, yes, I knew Whitman, Ransom, Coulson & Goetz.

“Q. Were the tax counsel?

“A. I knew they were the attorneys; I did not know they were the tax counsel.

“Q. Attorneys for whom, please? Your understanding at that time?

“A. Attorneys for the company, I believe.

“Q. The company or the corporation?

“A. I am a little confused at this point.

“Q. Take your time. The only thing we want is your best recollection and your actual understanding of [956] the position that you occupied at that time. Did you know or did you have an idea as to who Whitman, Ransom, Coulson & Goetz represented, as between the Western Pacific Railroad Company and the Western Pacific Railroad Corporation?”

Your Honor will appreciate that I am reading this at the request of opposing counsel.

Mr. Clark: That is correct.

Mr. MacKinnon: I think he should keep on reading.

Mr. Adams (continuing reading):

“A. I really do not know definitely.

“Q. Did you know Mr. Nicodemus at that time?

“A. Yes.

“Q. And you saw him at board meetings, I guess? “A. That is right.

“Q. What did you understand Mr. Nicodemus' position to be, if any?

“A. He was the attorney for the corporation.

“Q. He was the attorney for the corporation?

“A. Yes.

“Q. During those meetings of the board of directors of the corporation, while you were on the board, and those you attended, did you hear any statements or representations to the directors that the tax matters were being handled by Mr. Polk or Whitman, Ransom, [957] Coulson & Goetz?

“A. Yes, now I believe I did hear Mr. Polk's name mentioned in such regard.”

The Court: I think I had better take a recess now. I have a criminal matter to hear.

(Recess.)

Mr. Adams: Your Honor, I was reading from the deposition of Mrs. Sheehan. Page 769:

“Q. Mrs. Sheehan, have you ever met Mr. Coulson? “A. Yes, I have.

“Q. Do you recall when that was?

“A. Well, I do not recall the exact time, but he was a director on the corporation board at one time, and he came into the office quite often.

“Q. It is true, is it not, that Mr. Coulson was

never a director of the corporation at the time you were a director?

“A. No, he was not a director?”

Then at page 770:

“Q. Did Mr. Coulson ever tell you how you should vote as a director?

A. No.

Q. Or give you any instructions as to how you should act as a director?

A. No, he did not. [958]

Q. Did you ever meet Mr. James K. Polk?

A. I never met him.”

Then at page 771:

“Q. I will ask you this general question: Did anyone ever tell you how you should vote; that is to say, give you instructions about it?

A. No.”

I have nothing further from Mr. Sheehan's deposition.

Mr. Clark: We have just one question and answer, your Honor, at page 768. May the record show that the last portion of the deposition read by Mr. Adams was in response to questions put by him?

Mr. Adams: That is correct.

Mr. Clark: And page 768, a question by Mr. Clark:

“Q. Did you exercise any independent judgment on any of these matters which were discussed during this period?

A. I do not think there was any occasion to.”

Mr. Adams: Now, if your Honor please, I should like to read from the deposition of the intervener, Henry Offerman; and turning to page 4705 of Mr. Offerman's deposition, being at the beginning of his deposition, which was commenced April 26, 1948—Mr. Offerman having been called as a witness in behalf of the defendant railroad company and as an adverse witness. Now, I will attempt to state the material here in order to save the Court's time.

Mr. Offerman is one of the interveners, he is 53 years of age, attended the Lawrenceville school at Lawrenceville, New Jersey, from which he graduated in 1914. He then went to Yale until the first war and returned after the war. He was in the class of 1918, honoris causa, and then returned and graduated in 1919.

Some years prior to the taking of his deposition, he took a course in the New York Institute in railroads. He thinks that was about 1945 or '44.

At the bottom of page 4706, Mr. Offerman said that he is a customer's broker, employed by Goodbody & Company, and has been engaged in that occupation since 1940. A customer's broker has detailed handling of accounts. Some people call them "account executives."

And then there is a question on page 4707.

"Q. What are the functions and duties of a customer's broker, Mr. Offerman?

A. To consult with clients regarding their investments, to suggest various investments, changes

in their portfolio, to handle the detail of their transactions, give them any financial information that they ask for.”

Prior to 1940 he was in the same business but in a different capacity. He was the manager of the bond department of [960] Babcock, Rushton & Company, which in January, 1940, merged with Goodbody & Company. Both of these firms are engaged in business in New York, or rather Babcock, Rushton was until the merger.

Page 4709:

“Q. Have you had business relations with Russell M. Van Kirk, one of the other interveners in this lawsuit? A. Yes, sir.

Q. Please describe what those business relations were.

A. I acted as broker for him mainly on securities listed on the New York stock exchange and curb, sometimes Chicago.

Q. Over what period of time did you have such business relations with Mr. Van Kirk?

A. From about 1935 until the date of his death.

Q. Which was quite recently, in this year?

A. In December, 1947.”

I stop to say that Mr. Van Kirk's deposition was not taken in this action for the reason that he was ill at the time and then died.

“Q. Have you had business relations with Farlee & Company? A. Yes, sir. [961]

Q. What were those relations?

A. The same as with Mr. Van Kirk.

Q. Over the same period of time? A. Yes.

Q. Do they continue up to the present time?

A. Yes, sir."

At this time, your Honor, I will offer as Defendants' Exhibit 17 a schedule identified as Railroad Company Defendants' 770, entitled "Schedule of Preferred Stock of Western Pacific Railroad Corporation Owned as of April 1, 1948, Showing the Dates of Purchase and Costs of each Certificate."

The Court: "Company," did you say?

Mr. Adams: Preferred stock of the Western Pacific Railroad Corporation.

Mr. Phleger: If it please your Honor——

Mr. Adams: May I complete my offer?

Mr. Clark: To whom does that schedule pertain, may I ask, your Honor?

Mr. Adams: Henry Offerman. That is 770.

Then I offer as Defendants' Exhibit 18 a schedule identified as Railroad Company Defendants' Exhibit 787, entitled "Henry Offerman, Summary Schedule of all Purchases and Sales of Western Pacific Railroad Corporation Preferred Stock."

The Clerk: Mr. Adams, the last exhibit in evidence was 16. [962]

Mr. Adams: This is offered as 17.

The Clerk: And the last one you referred to is 18.

Mr. Adams: And I offer as Defendants' 19 a schedule entitled "Cleta C. Offerman, Schedule of All Purchases and Sales of Western Pacific Railroad Corporation Preferred Stock," each of these

schedules having been produced at our request by interveners.

Mr. Phleger: May I record our objection? This evidence has absolutely nothing to do with the merits of this case. It is incompetent, irrelevant and immaterial. We might just as well go on and make proof of the fact that the preferred stockholders in the plaintiff corporation invested more than \$35,000,000 in their stock. In fact, the record shows that. But I take it that is not the matter we are trying here. To say that these interveners, who own a very small portion of the stock, paid so much for it is utterly incompetent, irrelevant and immaterial as to the issues of this case. I say the stock of this company, for which millions and millions and millions of dollars were paid, is represented by this corporation, which is the plaintiff.

Mr. Levy: Your Honor, just to record the position of the interveners on this, I wholeheartedly agree with Mr. Phleger, but the information was requested, we furnished it, and if your Honor thinks it is of any materiality, it is here. But I do not think it is either, and while we do not record an objection, [963] because we do not want to be in the position of appearing to keep from this Court any facts, we nonetheless concur in Mr. Phleger's position.

Mr. MacKinnon: Let me state our position with respect to this material. This is an equitable action. The interveners are in the action. This relates to the interveners' cause of action. Its

purpose is directed to that complaint. There is a motion before your Honor which you reserved decision on, and in connection with that motion, if nothing else, which will be renewed at the proper time, this material in my opinion has a very relevant and material bearing.

Mr. Adams: May I add a word, your Honor, to what has just been said by Mr. MacKinnon? This material was not furnished until there had been an argument presented before a Federal judge in New York and it was refused.

Mr. Levy: That is not true, Mr. Adams. I do not like to say that to you, but it is a fact, and I wish you would withdraw your statement.

Mr. Adams: Let me be sure about this.

Mr. MacKinnon: I think you are mistaken, Mr. Adams.

Mr. Adams: Very well, I am wholly mistaken. I should not have made the statement. I was entirely in error about that. I have a recollection of an argument, but I thought it pertained to this material.

Your Honor, one further statement in addition to what Mr. [964] MacKinnon has said: We rely, among other things, upon the authority of a decision of the United States Supreme Court in what I have referred to heretofore as the Comstock case, decided last year by the United States Supreme Court, and in a decision written by Mr. Justice Jackson. Mr. Justice Jackson stated that the appellant Comstock came into that proceeding at low

prices for the particular securities he held, and after an investigation he had made, going to show that here was a speculative possibility, that he was a speculator in that litigation, that he himself had no equities whatever, and I suggest that if the United States Supreme Court sees fit to make those statements in regard to a matter quite similar to this one—that was a proceeding in reorganization—the evidence we are offering is material and relevant.

The Court: I think I remember reading that case, but I do not carry it in my mind. It was some right of an intervener that was being asserted?

Mr. Adams: Yes, your Honor. Comstock was an intervener in that proceeding.

Mr. Levy: They were bondholders in a reorganization.

The Court: Some equitable right was asserted by them with respect to their position with the company, and the fact that the interveners had acquired the stock with the idea in mind that maybe they could litigate the matter and get something out of it was taken into account by the Court as an equity in [965] the case.

Mr. Adams: That is right, your Honor.

Mr. Levy: That was not a stock case at all. It was a bondholder's case, where the bondholder purchased the bonds after a certain plan had been promulgated and approved by the Court, and then he fought the question of the plan up to the Supreme Court.

The Court: I understand the point. What difference does it make in this particular case?

Mr. Adams: It goes to the equities of the interveners' case.

The Court: If the Western Pacific Railroad Corporation and its stockholders are entitled to some relief in the case, would the Court deny it because these men, as they sometimes do, go in on these shoestrings in the hope that something may come from it? Would that decrease the right of the plaintiff in the case?

Mr. Adams: Your Honor, we are entitled to show this as an equity, and involved in the equity is the question of the laches of these stockholders, the parties who bring this case before your Honor. There are no other stockholders here. The plaintiff is bringing the suit itself. This does not go to the plaintiff's case. It goes to the stockholders' case, the stockholders saying they bring something to your Honor that the plaintiff does not have.

The Court: Equity does not punish anyone. If the stockholders of the plaintiff corporation are entitled to relief in this case, would it make any difference that the interveners were speculators who appeared on the scene and stirred this thing up?

Mr. Levy: Not the slightest.

Mr. Adams: Your Honor's queries as to whether this has anything to do with this lawsuit I should like to respond to. This lawsuit is a lawsuit originated by these stockholders who were speculators,

and one of the questions involved in the lawsuit is the defenses that we bring forth, and our defenses include not only the statute but laches and bar of the reorganization. These stockholders, we think we are entitled to show, had not only full opportunity of knowledge but busied themselves about this and had no equity. They could have come into the reorganization court and brought this case to the court. They were subject to no domination or control. The court was open.

The Court: Is it your theory that the plaintiffs could prevail in this case and the interveners could not?

Mr. Adams: I think that is a fair statement, yes.

The Court: In other words, equity should say that the plaintiff should prevail because they have a right, but the interveners being speculators who started the thing should, let us say, suffer the burden or punishment of not being able to recover as stockholders a share of the corporation's [967] recovery?

Mr. MacKinnon: That is stating it very differently from what your question posed.

The Court: Perhaps so. I find sometimes if I put these questions sort of crudely, I get more response from the lawyers.

Mr. MacKinnon: The question as was posed, the answer is definitely yes; the interveners stand or fall on their own bottom. The plaintiff stands or falls on its own bottom. Whatever equities are against the interveners are against them.

The Court: There could be a different defense, then, to the interveners than to the plaintiffs?

Mr. MacKinnon: Definitely.

Mr. Phleger: May I state for just one moment? The Comstock case has been mentioned here, and about the only real application the Comstock case has here is that Mr. Justice Jackson said it did not make a bit of difference how the interveners or the plaintiffs in that proceeding got their stock; the matter would be considered by the District Court on its merits, because the right was the right of all people who were similarly circumstanced, the very point we are talking about. The intervention was allowed here in order that a cause of action belonging to the corporation might be asserted. The interveners have no separate cause of action. All they do here can aid the plaintiff. The plaintiff is entitled to any cause of [968] action exposed by the facts. But what they paid for their stock is utterly immaterial. The idea that the plaintiff's right could be destroyed by an equity running against people who held only a small number of shares shocks the conscience.

Mr. Adams: It did not shock Mr. Justice Jackson's conscience.

Mr. Phleger: I suggest that you read that case to the Court:

Mr. Adams: Yes, I would be very happy to do so.

Mr. Levy: Your Honor will find in this very district, in the case of *Blum v. Fleishhacker*, de-

cided by Judge St. Sure, the Judge made an express finding that the motives of this particular plaintiff who brought a derivative action had not the slightest thing to do with whether or not the corporation on whose behalf he was suing had or did not have a right of recovery, and he so decided the case.

Your Honor will find that in the famous Penn-road case, which we have cited in our brief and I think Mr. Phleger has cited it also, the Court made the same conclusion. And your Honor will find that the Circuit Court of Appeals for the First Circuit has expressly stated, and Judge St. Sure relied on it, that when you have a derivative right asserted by shareholders, if the corporation has the right, they may assert it.

I just want to point out one thing to your Honor. Mr. Adams examined Mr. Offerman on deposition for two weeks. [969]

Mr. Adams: There is nothing surprising about that. These depositions in many cases lasted a long time.

Mr. Levy: Mr. Adams, may I continue uninterruptedly? The examination went on for two weeks and was directed to show the motives, whatever Mr. Adams conceived them to be, of Mr. Offerman in launching this lawsuit, and your Honor will find that in an effort to show Mr. Offerman's motives he went into matters that were completely unrelated to this tax transaction, because this tax transaction did not occur, your Honor will recall, until

July 15, 1944, and Mr. Offerman became a stockholder of this corporation for the first time in June of 1942. Now, it is a fine-spun theory that had no legal basis, it has no factual basis, and I think you will find that it will serve only to clutter this record with something that has nothing to do with the fundamental question, and that is whether or not this corporation, because of the relationship between it and the defendant during the critical period, had a claim which is now properly being asserted. If your Honor wants to try the issues, I think they will contribute nothing to the end result of who is entitled to win this case.

Mr. Adams: I can read what I am going to read out of Mr. Offerman's deposition in an hour, if I read without interruption. I am not going to impose on your Honor at any great length.

Mr. Clark: The objection was directed to the exhibits. [970] Mr. Phleger made the objection; we did not. We are simply stating our position.

Mr. Adams: I take it you make no objection?

Mr. Clark: I think the record will show we made no objection.

Mr. Levy: It was so stated, though I concurred with Mr. Phleger's position.

Mr. Clark: Your Honor must find on the basis of decisions in this district and elsewhere in the end that the amount of stock, the price paid for it, and the so-called motive is immaterial, and factually the Offerman situation does not square up with Mr. Adams' contention, but if your Honor wants it in the record we do not care.

Mr. Levy: I do not want it understood by not making objections that your Honor will permit Mr. Adams to go on as he did in the depositions.

The Court: Are you going to read other testimony which you say will take some time from this deposition on the same subject matter as referred to in the exhibits?

Mr. Adams: No, your Honor. I am going to read some testimony, but it won't be very long. It is in Mr. Offerman's deposition. It is not testimony about prices or purchases that are shown in these exhibits.

Mr. Levy: It bears on the same subject, doesn't it, Mr. Adams, namely, your defenses? [971]

Mr. Adams: Certainly it bears on our defenses or we would not offer it.

The Court: I will reserve ruling on these exhibits until I hear what you are going to read from the deposition.

(The schedules referred to were marked Defendants' Exhibits 17, 18 and 19 for Identification.)

Mr. Adams: Now, if counsel will turn to the top of page 4736——

The Court: Do you happen to have the citation of that Comstock case?

Mr. Adams: I haven't it here, but I will get it.

Mr. Phleger: I have it.

Mr. Levy: Would your Honor like to have the citations of the cases I mentioned as well?

The Court: The Comstock case?

Mr. Levy: No, but the three cases I referred to.

The Court: Before we adjourn for lunch you may give them to the clerk.

Mr. Phleger: I have the Comstock citation, your Honor: 335 U.S. 271.

Mr. Levy: Here are the three cases to which I referred: 21 Fed. Supp. 527, which is the Blum v. Fleischhacker in the District Court here; Johnson v. King-Richardson, 36 Fed. (2d) 675, page 677, relied on by Judge St. Sure—that is the Circuit Court for the First Circuit—the Pennroad case, [972] which is 42 Fed. Supp. 586, at page 625, which is the finding and conclusion of law, a Delaware case, since this is a Delaware corporation and the rights of the stockholders derive by Delaware law, Echleman v. Keenan, 181 Atlantic 657.

Mr. Adams: At page 4743, being the last question on that page:

“Q. At the time you made this first purchase, what did you learn about the status of the various subsidiaries of the Western Pacific Railroad Corporation?

A. Well, my recollection is that after much investigation, that the whole matter was quite confused as to the exact status of the subsidiaries, the loans that had been made and the pledging of the various stocks, were a question of some doubt whether there had been a capital contribution there or just how they stood.

Q. What was the question as to the capital contribution that you learned about in July, 1942?

A. By the loaning of the money to the Western Pacific Railroad Company without security, inasmuch as they had the same officers and directors.

Q. Did you learn at that time that they had the same officers and directors? A. Yes, sir."

Now, I read the preliminary questions solely for the [973] purpose of leading up to the last question the witness learned "that they had the same officers and directors."

Mr. Levy: By preliminary questions, do you refer to the first and second?

Mr. Adams: Yes, the first and second, and I can only get to the third one by reading the first two.

Mr. Levy: And that was the purpose of your reading?

Mr. Adams: That was the sole purpose of my reading. Page 4747:

"Q. Did you inform yourself and learn prior to the time you made your first purchase that there were interlocking directors and officers?

A. I gained such information from the reports, yes, sir.

Q. And that was one of the factors that you had in mind at the time you purchased the stock?

A. Yes, sir." [974]

Mr. Adams: Page 4853. Question at the bottom of that page: "Q. Do you have any recollection that the railroad company's reports for 1942, 1943 and 1944, or any of them, were among papers that you removed from your files and destroyed?"

“A. No, sir.

“Q. Do you have any recollection one way or the other on that subject?

“A. I know that they were not removed from the file, if they were ever in there.

“Q. Have you any recollections to whether or not they were ever in there?

“A. If they are not in there now, they never were in there, because I may have used Goodbody’s file, and those copies would be returned for their files. This was my own personal file, in which I had extra copies. I used the combination of the two, and after a while, I ceased collecting a lot of things in my own file and just used what was available in Goodbody’s. I didn’t see any use in having two reports.”

Page 5002:

“Q. Did you know Mr. Thomas M. Schumacher and Mr. Sidney M. Ehrman were the trustees in reorganization of the Western Pacific Railroad Company during the period 1935 to the end of 1944, and were discharged as such in May [975] of 1945?

“A. Yes, sir.”

Then the witness supplemented the answer, saying, “My knowledge does not concern the dates.”

“Q. What was the source of your information as to the fact that Mr. Schumacher and Mr. Ehrman were trustees in reorganization of the Western Pacific Railroad Company?

“A. The annual reports.”

Page 5128:

“Q. Mr. Offerman, how long had you known Mr. Russell Van Kirk?

“A. About twenty years.

“Q. Were you near neighbors for several years prior to the death of Mr. Van Kirk in 1947?

“A. Yes, sir.

“Q. Were you and Mr. Van Kirk engaged in the same business in New York during the period of your acquaintance with him?

“A. A similar business.

“Q. Did you act as brokers for each other in connection with securities transactions over the period of years that you knew him? “A. Yes.

“Q. Did you frequently discuss matters of common interest [976] with Mr. Van Kirk?

“A. Yes, sir.

“Q. Would you say that you have known Mr. Van Kirk closely and intimately?

“A. Yes, sir.

“Q. What was the relation of Mr. Van Kirk to J. S. Farlee & Company?

“A. I believe he was the chief stockholder.”

Your Honor will bear in mind J. S. Farlee & Company is the other intervener in this case. Page 5137:

“Q. Did Mr. Van Kirk at any subsequent time tell you that he had made any further investigation or inquiry into the Western Pacific?

“A. Yes, sir.

“Q. When was that subsequent occasion?

“A. Early in 1946.

“Q. What did Mr. Van Kirk tell you at that time

about investigations or inquiries made by him?

“A. He had looked into the matter of the filing of consolidated tax returns. He had seen a clipping in a newspaper about Consolidated Electric & Gas, I think it was. I saw the same thing and we discussed it. We discussed the consolidated tax returns.

“Q. Referring to that time early in 1946, was the substance of what Mr. Van Kirk told you as regards any [977] inquiry or investigation at that time that he had seen some newspaper clippings about Consolidated Electric & Gas that related to consolidated tax matters? A. Yes, sir.

“Q. Did he tell you at that time that he had made any other inquiry or investigation in regard to the Western Pacific? A. Yes, sir.

“Q. What did he tell you in that regard?

“A. That he had looked into the matter carefully, talked it over with attorneys, and thought that the same principle as referred to in the clipping would apply to the Western Pacific.

“Q. Did you understand from what Mr. Van Kirk told you that his interest in this particular subject was aroused by reading the newspaper releases on the Consolidated Electric & Gas?

“A. Yes, sir.”

Page 5192:

“Q. Mr. Offerman, have you made any commitment or agreement with anyone that in any way limits your privilege or right to buy or sell Western Pacific preferred?”

Mr. Levy: Now I object to that, your Honor. I can't see the slightest materiality to that. I object because it is part of this effort of Mr. Adams to inject completely immaterial [978] matters into this case.

The Court: Have you made any agreement with anyone for what?

Mr. Adams: Limiting his privilege or right to buy or sell stock.

The Court: Limiting whose privilege?

Mr. Adams: Mr. Offerman's personal privilege or right.

The Court: What does he answer it, "no"?

Mr. Adams: Yes.

The Court: Go ahead.

"Q. (By Mr. Adams): You are entirely free to buy or sell Western Pacific preferred at any time? A. Yes, sir."

Page 5194:

"Q. Mr. Offerman, during the year 1943, did you as broker or customer's man purchase or sell preferred stock of the Western Pacific Railroad Corporation for the account of your clients or customers?

"A. It is my recollection that some customers bought and sold the stock."

Then going toward the bottom of that page:

"Q. And subsequent to 1943, have you continued as broker or customer's man to buy and sell stock for the account of your customers or clients?

"A. Yes, sir."

Page 5200: [979]

Well, it is noon hour, your Honor, and I seem to have missed a spot. If it is convenient to your Honor to take the recess now?

The Court: Well, we will reconvene today at 2:15. I have this criminal matter at 2:00 o'clock. We might as well take the extra time.

Do you consider that, from the equitable point of view, Mr. MacKinnon, there is anything essentially wrong in a person's buying on speculation stock in a corporation with the hope of perhaps thereafter increasing the value of the stock by instituting or causing the instituting of litigation?

Mr. MacKinnon: I certainly do.

The Court: That is the essential, equitable point that you are urging?

Mr. MacKinnon: That is only one of the points.

The Court: That is one of the points?

Mr. MacKinnon: Yes.

The Court: Now is that the subject matter of the discussion in these cases?

Mr. MacKinnon: No, I don't think so.

Mr. Adams: I think it is referred to in the Comstock case.

Mr. MacKinnon: Yes, in the Comstock case. It is not dealt with only in the sense of that question, though.

Mr. Levy: It is referred to in the cases I supplied to you, your Honor. Your Honor is mindful of the fact that Rule [980] 23 provides that you must be a stockholder at the time of the wrong in order to bring the action, and the situation is thus

encompassed in the Federal Rule, all of what was previously urged as efforts to buy stock in order to bring litigation. Now if you comply with that rule, as I understand the cases, you have done what you are supposed to do to be properly in the Federal Court; and I think that constitutes the complete answer to Mr. MacKinnon's question as well.

Mr. MacKinnon: I am not saying they have a right to do whatever they have a mind to with this stock, but they are coming into this court and asking this court to exercise equitable principles in their favor, and I say in the exercise of those equitable principles, your Honor has to see the facts and weigh their purposes and their motives and the price they paid, their activities in creating a market.

The Court: Only if there is some equitable disability.

Mr. MacKinnon: That is right. This is such a case. This is an equity case. Nobody can point to any law on this subject.

The Court: But granted it is an equity case; do you have to have an equitable disability on the part of the plaintiff, recognized by law?

Mr. MacKinnon: That is right.

The Court: Before you can——

Mr. MacKinnon: No, I wouldn't say that at all—not recognized by law. [981]

The Court: I think that is where we sometimes make mistakes in decisions, where we reach out into the air and pull in something which we think ought to be the way to do things.

Mr. MacKinnon: But that, your Honor, is the very thing you are asked to do in this case, because they cannot point to any law in this case. There is no precedent for this case.

The Court: Well, that still doesn't mean——

Mr. MacKinnon: That means that you, as a chancellor, will have to determine on the basis of all the equities whether you believe there was over-reaching. You are not going to find your basis in *stare decisis* or anything of the kind. You are asked as the chancellor to determine whether or not you should involve equitable principles under the circumstances here present.

The Court: Well, I don't see that that thing is the precise issue that we have now, as to whether or not there is any equitable disability on the part of the interveners.

Mr. Levy: Your Honor, may I say one more word on the point?

The Court: In other words, if the stockholder is entitled to bring the action, it wouldn't make any difference how many shares of stock he traded in.

Mr. MacKinnon: His motive in an equitable case is certainly, in my opinion, of the most material importance.

The Court: Well, let's suppose that I owned 5000 shares of the corporation's stock, and had owned it for ten years before 1934. [982]

Mr. MacKinnon: I would say there, your Honor, there would be no question.

The Court: Well, this man owned some stock in '42, didn't he?

Mr. Adams: Yes, he bought it on a spec after he looked into the matter of the disabilities possibly arising from interlocking directors.

Mr. Levy: It has nothing to do with taxes.

The Court: Don't all your clients buy stock in corporations on speculation?

Mr. Adams: Not only after investigating the importance of, or the possibility of, having a lawsuit and investigating whether there would be any disability arising from interlocking directors.

The Court: Well, there are lots of reasons people buy stock. They buy stock because they think the corporation is a losing proposition; I think I have heard of people doing that. So they could take stock losses. I don't think that that has anything to do with this.

Mr. MacKinnon: No, I don't think that has. I don't care whether, as a matter of fact, they want to invest this money in stocks and bonds—that is their business and that is perfectly o.k. But this is a market operation, in my opinion. When the schedules indicate that their stock, by reason of their market operations, cost them about 37c a share, or nothing—it is all concentrated into a very limited period. Now I do think that is [83] an equitable factor of considerable importance for your Honor's weighing.

The Court: Well, of course, wouldn't that affect the right of any stockholder then, who owned stock in the company, as to whether he traded it during the times that are involved here?

Mr. MacKinnon: No, I wouldn't say so at all. I would say if a person went out and bought stock in this period of time and was a holder of that stock, your Honor would approach the equities in that situation very differently than a man who was in a position of a customer's broker, going out and stirring and creating interest in the stock for the very purpose of raising the price of the stock.

Mr. Clark: Are you testifying, Mr. MacKinnon?

Mr. MacKinnon: I am making an argument to the court, and that is the purpose that the court addressed his question to me, and that is where my argument will be addressed at all times.

Mr. Levy: Will Mr. MacKinnon state to the Court that the evidence justifies that assertion?

Mr. MacKinnon: I believe it does.

Mr. Adams: So do I.

Mr. Levy: Your Honor will be mindful of the wild charges. I think there is absolutely nothing in the record to justify it, apart from any legal argument of relevancy.

Now just hypothesize that instead of this plaintiff corporation having determined after we brought the New York action that [984] action should be brought; hypothesize that they didn't do that and that these stockholders, instead of being interveners, were the plaintiffs before this court, suing on the same situation; just assume that we proved the same case that has been proved here, and let's assume, to carry it one step farther and pose the question at the North Pole, that your Honor con-

cluded that this corporation was 1000% entitled to the recovery which the intervener said it ought to get. Then Mr. MacKinnon would come to you and say that because they are in Wall Street, that that name, and because they have bought some stock, that therefore the corporation couldn't get any of these tax savings, and Mr. Adams' clients should not do otherwise than nobly be left with a windfall.

Now that is what that argument comes to.

The Court: Well, I don't understand that Mr. MacKinnon has made the argument that anything that the interveners have done prejudices the plaintiffs.

Mr. MacKinnon: No, I did not.

The Court: He has some theory that the interveners——

Mr. MacKinnon: They stand on their own body.

The Court: He has some theory that the interveners are going to be under some disability with respect to this case; that is the point as I understand it.

Mr. MacKinnon: That is right.

Mr. Levy: That is the point, but I only want to emphasize [985] the nature of the point by pointing out to you that if the interveners were here on behalf of the plaintiff, without the plaintiff corporation, for instance, as they are in New York, if Mr. MacKinnon's argument is sound, then the action would be defeated for these reasons. I don't want your Honor to think——

The Court: Well, I understand.

Mr. Levy: I want to focus it that way. I think——

The Court: Counsel, I think the heavier burden to sustain is on your side of this precise question.

Mr. MacKinnon: To show the disability? Yes. Well, that is the burden we took on. That is what we are trying to do. That is the purpose of these schedules.

The Court: Well, I am trying to find out what the logical reason is for the rule which you contend should apply.

Mr. Adams: Your Honor, may I address myself to the court as to that question? The plaintiff comes to court, and there are certain defenses raised against the plaintiff. Now those are good or bad, as against the plaintiff; and an issue lies between the plaintiff and the defendant. There are the affirmative defenses—the bar, laches, time of various sorts, estoppals. Now then, maybe those defenses are good, but the interveners come in and they say to your Honor, “Well, your Honor, those defenses aren’t good defenses against us. They are not good defenses against the stockholders,” because of some of these things they point to. Some of these assertions they make, that there is [986] duality, domination, control and that sort of thing. They say they are in a position to obtain a judgment for this plaintiff, that the plaintiff itself, perhaps, is prevented from getting; for the reason that those defenses don’t run against them. They say we hadn’t notice. Those contentions, as I understand it, have been in this case.

The Court: I don't understand that to be Mr. MacKinnon's point.

Mr. Adams: No, I don't think so either, but I am presenting that suggestion to your Honor.

The Court: I can't see much merit in that. I am just wondering whether or not there is anything that would mean that equity is such, shall I say, that even though a meritorious cause of action be developed and sustained, that equity would be so heartless as to say that the fellow who brought it about, no matter how much he may have been a speculator for his own benefit, that that is going to shut him out from the recovery, if there were one made. It seems to me that is kind of a cold blooded doctrine, and I am just trying to find out your position.

Mr. MacKinnon: I think equity is a cold blooded doctrine under certain circumstances.

Mr. Levy: Not as I learned it in law school.

Mr. MacKinnon: Well, if you cite the maxims, you won't have much difficulty.

The Court: I think we had better let you gentlemen go to [987] lunch.

Mr. Phleger: I would simply like to point out that we filed this lawsuit, we made the evidence, and if that evidence shows that the plaintiff is entitled to recovery, it seems to me it is utterly and wholly immaterial what this intervener did, how he got his stock; or evidently we are trying to have a trial within a trial here. I don't see how the plaintiffs are affected in the slightest degrees by this issue.

Mr. Adams: Your Honor will bear in mind that the objection comes and is stated solely from this side of the house. There is no objection before your Honor from the interveners.

Mr. Levy: I just want to make that point, too, your Honor.

The Court: Well, perhaps Mr. Phleger is feeling in a generous mood today and wants to do something for the interveners, even though they have been shooting a few barbs at him once in a while.

Mr. Adams: I suggest that that may pertain to your Honor's consideration.

Mr. Levy: I want to say, because we have not made many objections because, as so often happens, when you generate this kind of a fuss there is some lingering thought that there is something in the position of the defendant. For that reason, we haven't made the objections, and the evidence can go in for some purpose and go so far, and then maybe we will fight about it. But I do think that in principle, Mr. Adams' position is wrong. [988] I think Mr. MacKinnon's position is wrong. I think it would be a mistake of law if your Honor ruled in favor of it.

Mr. MacKinnon: Your Honor understands that if we thought the plaintiffs and interveners were right, we wouldn't be having a lawsuit, so it is fairly obvious Mr. Levy thinks we are wrong.

The Court: Well, we will continue this afternoon.

(Thereupon a recess was taken until 2:00 p.m. this date.) [989]

Afternoon Session—2:00 P.M.

Mr. Adams: May I have the Offerman deposition, beginning at about page 5000? Page 5005:

“Q. Do you assert that either Mr Schumacher and Mr. Ehrman as trustees or either of them were party to a plan to deprive the corporation of any rights they felt they had in connection with the income tax returns for 1942, 1943 and 1944?

A. I do not understand the question, sir.

Mr. MacKinnon: Read it.

(Question read.)

Mr. Levy: Answer if you know, Mr. Offerman.
The Witness: No.

Q. (Still by me, your Honor): Do you assert that the board of directors of the railroad company during the period it was in reorganization—I am speaking of the board of the company—while the railroad company was in reorganization, do you assert that the board of directors had anything to do with the income tax returns for 1942, 1943 and 1944? A. No.

Q. Do you assert that the board of directors of the company, after it was reorganized, the present board of directors, was party to a plan to deprive the corporation of any rights which the board considered the corporation had in connection with the income tax returns for 1942, 1943 and 1944?

A. No.

Q. Do you assert that this board of directors, that is, the board of the present railroad company,

had any intent or purpose in the income tax matters to aid or favor the James interests?

A. No.

Page 5200:

“Q. In the advice you have given to your customers subsequent to June, 1946, what have you advised them was the relation between the litigation and the value of the Western Pacific preferred?”

Mr. Levy: Your Honor, what has that to do with this litigation? I object to that as being incompetent, irrelevant and immaterial.

Mr. Clark: Also it assumes something not in evidence.

The Court: Did he answer it and tell what important advice he gave?

Mr. Adams: Yes.

The Court: What is the relevancy of that?

Mr. Adams: It is directly relevant to the matter under discussion this morning, your Honor, Mr. Levy's contention [991] being that there was nothing in the way of the activities of these gentlemen, in the way of market transactions in relation to this lawsuit, and this answer is directly responsive to that question.

The Court: I think the objection is good. I will sustain it.

Mr. Adams: Page 5265: The question at the bottom of the page:

“Q. Do you have any authorization from any stockholders of the corporation to act in their behalf in this litigation?”

Mr. Levy: I want to object to that question as being utterly immaterial, incompetent and irrelevant, and having no importance in this litigation that I can see.

The Court: This is a representative suit, isn't it? I mean the intervention is a representative suit?

Mr. Clark: It is a question of law, your Honor.

Mr. Adams: This is a question of fact, your Honor, that I asked of the witness, not meaning to have any discussion about the law at all. I want to find out from him whether in fact he held any authorization from any other preferred stockholder.

The Court: I do not see the materiality of that. I will sustain the objection.

Mr. Adams (reading):

“Q. Had you solicited any such authorization from [992] the preferred stockholders of the corporation?”

Mr. Levy: Same objection, same grounds.

The Court: Same ruling.

Mr. Adams (reading):

“Q. What financial interest do you have in this litigation?”

This is on page 5266.

Mr. Levy: Same objection, same grounds. The evidence in the case shows what his financial interest is.

Mr. Adams: There has been an objection to that evidence.

Mr. Levy: The stock holdings of this witness have been put in by stipulation.

Mr. Adams: Oh, no, the fact that this particular witness has not a dollar invested now that he has profited on the transaction, those facts are not in evidence. They have been offered and his Honor has not ruled on them.

The Court: If it is necessary to determine this matter, I think I should be ready to rule on that now. I read the decision—I did not have an opportunity to study it—in the so-called Comstock case. I do not see that that has any bearing on this matter.

Mr. Adams: I shan't argue that, your Honor. I will only state that in the Comstock case the evidence was received, that each of the courts that dealt with the Comstock case in turn, the District Court, the Circuit Court of Appeals and [993] the Supreme Court considered and they commented upon that evidence.

The Court: In the Comstock case the man came along after the reorganization had been in progress ten years and then acquired some stock, and then sought to have the Court redetermine the claim of a creditor that had been filed a long time before that time, despite the fact that obviously that was a dilatory procedure in the course of the administration of the estate; the court nevertheless let the man be heard and still decided the matter whether the claim was proper on its merits and held that it was. It held that even though there was domination and control, that nevertheless the domination and control did not have the effect of accomplishing any

unconscionable or improper result on the merits of the case. But I cannot see how there can be any possible relevancy as long as the intervener, bringing an action in a representative capacity, satisfies the requirements of our procedural rules and was a stockholder prior to the time the cause of action arose. Anything else is immaterial, and the fact that this is a suit in equity should not result in the imposition of any sanctions by virtue of the activities of the intervener that haven't got anything to do with the cause of action. I do not think that there is any judge that has ever held that, and if there were, unless he were a higher judge, I would not be inclined to agree with him. I do not think that equity could [994] possibly act in such a harsh manner as that. There is just no point to it. The objects of the principles of equity are to do equity. And in the guise of and under the panoply of equitable rules, if you do just the reverse, you are certainly not doing equity in the matter. I think all this line of testimony is incompetent and I so hold, and I will sustain the objections to this.

Mr. Adams: May the exhibits be marked for identification?

The Court: They have already been marked for identification.

Mr. Adams: They have?

Mr. MacKinnon: As 17, 18 and 19.

The Court: That is right.

Mr. Adams: And I think, just to be sure I have a ruling on the question, I will ask the question once more, the last one I read:

“Q. What financial interest do you have in this litigation?”

to which I understand objection was made. Did your Honor sustain the objection?

The Court: Well, I don't know whether this question involves—I don't know just what you mean by the question. What financial interest the man has—I assume he had some, because he sued.

Mr. Clark: The stock reflects it, your Honor; whatever the stock reflects of his assets, the assets of the corporation. It has been conceded that Mr. Offerman holds 4000-odd shares [995] of the stock and has been a stockholder since early 1942. That is all there is to the matter.

Mr. Adams: I am just offering this for the record.

The Court: Well, have you in mind some other purpose? I am not ruling in the dark on the matter—is there some other field or purpose, some other field of investigation or purpose to the question?

Mr. Adams: The last question, your Honor, “What financial interest do you have in this litigation?” was asked to find out specifically what that financial interest is. There was no other purpose.

The Court: Well, I will sustain the objection.

Mr. Adams: Now, your Honor, at this time, with your Honor's permission, Mr. Matthew will put in a part of our defense relating to proceedings in the reorganization court.

The Court: Did you have any other matters that you wanted, either side, in connection with the deposition of Offerman?

Mr. Clark: No, sir.

Mr. Levy: May we reserve the right to read some part——

Mr. Clark: No, it is struck out.

Mr. Levy: It is struck out?

I didn't understand the Court's ruling that everything that has been read was struck out.

The Court: Well, everything that has to do with activities of the witness with reference to acquisition of stock [996] and matters of that kind. I don't recall—though there was some preliminary matter of whether he went to Yale and things of that sort which I don't think is important.

Mr. Clark: As I understand it, your Honor, everything developed along the line that we have been discussing and with respect to which the offer of certain documents was made is stricken from the record as the result of this ruling—or at least your Honor has indicated you don't intend to give any weight to it.

The Court: Well, Mr. Adams has read all of the questions and answers, and they are all in the record, and I think that with what is in the record and the ruling that the Court has made, you are protected.

Mr. Clark: I think so.

Mr. MacKinnon: Well, if your Honor is striking, will you so indicate, because I would like to have an exception?

The Court: You will not have to take an exception.

Mr. MacKinnon: I do have to take an ex-

ception to that; there is a specific motion, as I understand it, which is being brought in through the back door, on the question of all the testimony that has been adduced. There is no necessity of an exception with respect to the three or four objections that have been made and sustained. As I understand it now, the interveners take the position that your Honor is striking everything that is in the record. [997]

The Court: Well, I didn't mean that. I meant just everything to which this objection applies.

Mr. MacKinnon: The last objection?

The Court: The objection to which I referred in the ruling. [997-A]

Mr. Clark: Right. Well, may it please your Honor, so that we can get a motion to strike which meets all the technical requirements, may I reserve the right to make that after we get the record written up, and then I will mark the places which I think are consistent with your Honor's ruling, and make a formal motion to strike that in that fashion to satisfy Mr. MacKinnon?

The Court: Counsel's rights will be protected then.

Mr. MacKinnon: Any way they wish to do it.

Mr. Adams: Surely.

Mr. Matthew: May it please the Court, I ask leave to present certain documentary material from the record of the reorganization proceeding in this matter, and first I would like to offer certain excerpts from the commission's plan of reorganization.

The Court will recall that Mr. Phleger referred to the plan, deeming it unnecessary to offer it physically in the record, in which suggestion I fully concurred. He read briefly from the plan, and I desire to read briefly two or three excerpts. The Court will have in mind that in the preliminary memorandum of the defendant, the Western Pacific Railroad Company, we reproduced in the appendix certain excerpts from the commission's reorganization plan, and likewise certain excerpts from orders of the reorganization court. It might be convenient for the Court just to refer to that appendix in following some of my quotations. I have a copy here, if it is not readily available [998] to the Court.

The Court: Do you have another copy?

Mr. Matthew: Yes, I have.

(Handed to the Court through the Clerk.)

Mr. Matthew: First, I desire to read some of the text which appears upon page 3 of appendix A to the preliminary memorandum of defendant, the Western Pacific Railroad Company, to which I have just referred. It appears about in the middle of this printed pamphlet. I read first from the commission's plan or order certain definitions as follows:

“The debtor shall mean the Western Pacific Railroad Company.

“Consummation of the plan shall mean the transfer to the reorganized company to the extent con-

templated by the plan of the properties and assets of the debtor.

“The reorganized company shall mean the corporation whether the debtor or a new corporation which shall acquire substantially all of the properties now held by the bankruptcy trustees and issue the new securities provided for by the plan.”

That ends the quotation. I think the pertinence of those definitions is obvious without the aid of comments. I now desire to read Subdivision Q of the plan, appearing on page 4 of Appendix A to this preliminary memorandum. I am now quoting:

“Claims against the debtor entitled to priority over any [999] mortgage of the debtor, current liabilities and obligations incurred by the trustees of the properties of the debtor during the reorganization proceeding, and expenses of reorganization allowed by the court within the maximum fixed by this commission, shall be paid in cash or assumed by the reorganized company, provided that any amounts so assumed by the reorganized company shall constitute a charge upon the properties of the reorganized company prior in lien to all new securities issued under the plan. When so treated, claims against the debtor entitled to priority over any of its mortgages are found not to be affected by the plan, obligations under the debtor’s equipment trust certificates, the Baldwin lease, and the Pullman contract, are found not to be materially and adversely affected by the plan. The reorganized company shall be deemed to have assumed the executory contracts of the debtor, which by their terms do not

terminate at or prior to the conclusion of the reorganization proceeding, and which shall have been affirmed or shall not have been disaffirmed by the trustees of the properties of the debtor with the approval of the court prior to the confirmation of the plan, and also any executory contracts made by the trustees of the properties with the approval of the court, which by their terms do not terminate at or prior to the conclusion of the reorganization proceedings.”

I now desire to read from Subdivision R of the plan, the text appearing upon page 5, appendix A, to which I have referred:

“The capital stock of the debtor and the unsecured claims against the debtor not entitled to priority over existing mortgages shall be cancelled.”

After some text which is omitted and not deemed immediately pertinent, the quotation continues as follows:

“The plan may be carried out either by revesting the properties formerly of the debtor in the debtor company, or by transferring said properties to a new corporation organized for the purpose and the execution by the corporation in which said properties are vested of the new mortgages and the issue by it of the new securities contemplated by the plan.”

That is all the text I desire to read, from the commission's plan at this juncture. I now desire to offer a copy of the court's order of August 2, 1935, in the reorganization proceeding, approving the petition for reorganization as properly filed.

I understand that under the stipulation, it is not necessary to actually introduce physically in the record copies of these orders, but I thought it might be convenient to court and to counsel if I do actually offer for the record a copy of that order No. 1, signed by Judge St. Sure on August 2, 1935. I would like to have it received and marked with the next succeeding [1001] exhibit number.

The Clerk: Exhibit 20.

(Order No. 1, signed by Judge St. Sure, of August 2, 1935, was thereupon received in evidence and marked Defendants' Exhibit 20.)

* * *

Mr. Matthew: There are certain provisions of this order No. 1 which I think should be drawn particularly to the attention of the Court, and without preliminary comment, I think that I will ask leave to read briefly from the order which has just been received in evidence as Defendant's Exhibit No. 20.

Paragraph 2 of the order on page 1 of this typewritten text confers the customary authority upon the debtor as to the operation and the maintenance of the property. I need not read the entire text, I think. I desire to read a portion of the text appearing in lines 29 to 31 toward the bottom of the page. I now quote:

“And to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees.”

I think I should state to the court at this junct-

ture that it is that particular authority pursuant to which the firm of Pierce & Greer and Mr. Nicodemus was continued in the service of the trustees during the trusteeship, as has been shown in this proceeding.

The Court: Wasn't there another order made when the trustees were appointed?

Mr. Matthew: No, except this.

The Court: Or was this order incorporated?

Mr. Matthew: Yes, I was going to say, and I will come to that order a little later on, the later order of the court, which I shall shortly bring to your Honor's attention, confirms this particular authority and I make this explanation now for the reason that the court may have gained the impression that there was some specific order which authorized the continuance of the employment of Pierce & Greer, who had been counsel prior to the filing of the petition. It was this general authorization pursuant to which the firm of Pierce & Greer was continued in service and pursuant to which other counsel and attorneys were retained by the trustees from time to time.

I now turn to page 2 of the order, and again I shall not read the greater part of the text, which confers general authority of the conventional character upon the company, but I should like to read two sentences and particularly connecting at line 21 on page 2:

"The authority given by the foregoing shall not include authority to incur expense other than such

as is necessary in the course of the usual and ordinary maintenance and operation of the debtor's property. Any extraordinary [1003] expense and expense incident to reorganization of the debtor shall be subject to the prior approval of the court."

I now desire to read a portion of the text of paragraph 3 of the order commencing at line 27 on page 2:

"That the debtor is authorized in its discretion from time to time, and until further order of this court, out of funds now, hereafter, or hereafter coming into its hands, to pay (A) all taxes and assessments due or to become due upon the property of the debtor; (B) all necessary expenses of operating the railroads and conducting the business of the debtor, including among other expenses the wages, salaries, and compensation of all officers, attorneys, counsel, managers, superintendents, agents and employees retained by the debtor."

I think I need not read further at this juncture. I will just make the observation that this particular provision is in a sense correlated with or perhaps supplementary to the information given by the court to the company to perform as services, including the employment of counsel, and then complements that authority by authorizing the payment of the wages, salaries and other expenses thereby incurred. I think I need not read further at this time at least from this initial order, No. 1.

I now offer as Defendant's Exhibit No. 21 a copy of an order made by the reorganization court, by

Judge St. Sure, on [1004] September 23, 1935, entitled, "Order appointing trustees." May I refer the Court at page 3 of the copy of this order which has just been received of record. I desire to read the text commencing at line 3 and extending through line 7.

"And it appearing to the court that the creditors and stockholders of the debtor represent that the appointment of trustees herein should not disturb the continuity of operations by the corporate organization of the debtor and should be at minimum cost to the debtor";

I now turn to page 4 of this order and ask leave to quote the entire text of paragraph 2, which commences on line 27 of that page:

"That said trustees shall have all the title and shall exercise, subject to the control of this court and consistent with the provisions of said amendatory Section 77, all of the powers of trustees appointed pursuant to Section 44 of said act; and, to the extent not inconsistent with said amendatory Section 77, the powers of a receiver in equity proceedings; and, subject to the control of this court and jurisdiction of the Interstate Commerce Commission, as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor, which business shall be conducted in the name of the debtor by its regularly elected or appointed corporate officers, agents and [1005] employees, but under and subject to the direction of said trustees."

May I just add, if your Honor please, that I have quoted this text in part for the purpose of showing that it was by order of the court that the trustees were to conduct the business in the name of the debtor and be its regularly appointed officers, agents and employees.

May I also direct the Court's attention to paragraph 3 of this order on page 5, which I think will be responsive to the inquiry made by the Court a moment ago. Perhaps I should read that paragraph. It is quite brief, commencing at line 10:

“That said trustees shall have all of the powers, rights, privileges, duties and obligations heretofore granted to or imposed upon the debtor pursuant to the order of this court entered herein August 2, 1935, and any and all orders supplementary thereto or amendatory thereof; and each and all of the orders heretofore entered in this proceeding shall, with respect to the said trustees and the property of the debtor, be of like force and effect as though said trustees were therein specifically named in the place of the debtor, all of said orders being hereby incorporated in and made a part of this order by reference.”

If the Court please, I should simply add that by paragraph 1 of this order on page 4 the Court appoints three trustees, namely, [1006] T. M. Schumacher, Chairman of the Executive Committee of the debtor; Charles Elsey, President of the debtor; and Sidney M. Ehrman.

I desire to offer as our next exhibit a copy of the

opinion and order of Judge St. Sure entered in the reorganization proceedings on November 9, 1935, entitled "Opinion and order confirming the appointment of trustees as appointed by the court and ratified by the Interstate Commerce Commission."

(Document referred to was thereupon received in evidence and marked Defendant's Exhibit No. 22.)

Mr. Matthew: I think that the Court will allow me to state, in order to save a little time, that when the order of the court appointing the three trustees was considered by the Interstate Commerce Commission, the Commission concluded that there shall be no more than two trustees for the Western Pacific and accordingly it determined to approve the appointment.

The Court: The court appointed two trustees and appointed Mr. Elsey as manager.

Mr. Matthew: They thought two trustees should suffice for this property, and accordingly the Commission approved the appointment of Mr. Schumacher and Mr. Ehrman, and so of necessity the matter again came before the court with the result that this opinion and order which has just been received as Exhibit No. 22 was issued and assigned by the court. I think that all of the text of this opinion and order is pertinent, as your Honor will [1007] find, but I desire to read only a portion of it. I am now reading from the second page of this opinion and order commencing with the text in

the fourth line from the bottom of the page. May I say by way of interpolation the court is referring here to its prior order of appointing three trustees. I now quote:

“Subsequently to the order referred to, the Bankruptcy Act was amended by Congress making it mandatory upon the court to appoint one or more trustees——”

May I interrupt the quotation because I have misstated. The court is here referring to its initial order which contemplated that there would be no trustees but the property should be operated by the debtor with Mr. Elsey as its president. May I now resume the quotation because I think that clears a misconception of which I was guilty.

“Subsequently to the order referred to, the Bankruptcy Act was amended by Congress making it mandatory upon the court to appoint one or more trustees, and providing that if one who was connected with the debtor were appointed, there should also be appointed one who had no such connection, such appointment to be subject to confirmation by the Interstate Commerce Commission. Immediately upon such amendment being made, the Court proceeded on formal hearing in the manner required by the act to appoint trustees for the property of this [1008] particular debtor. The court desired that at least one trustee should be a person residing within the district, experienced in railroad management, and familiar with the railroad of the particular debtor, and in whom the court had con-

fidence. Such a person was Mr. Elsey. The large creditors of the debtor and the controlling stockholding interest in it requested the appointment of Mr. T. M. Schumacher, Chairman of the Executive Committee of the debtor, representing that he had conducted all negotiations looking to the formulation of a plan of reorganization. Mr. Schumacher had his residence and his office in New York. The court was willing to accede to this request provided there was also appointed as trustee one who resided and had his office in this district and could attend to the immediate management and operation of the property. The selection of Mr. Elsey and Mr. Schumacher required the selection of a third trustee not connected with the debtor. As such trustee the court selected Mr. Sidney M. Ehrman, a lawyer of large experience, in whose discernment, judgment and integrity it had full confidence.”

May I remind the court on that showing of the record that at the time when this appointment of trustees was made, Mr. Schumacher was the president of the plaintiff corporation. He was also the highest officer of the debtor company, being the chairman of the [1009] Executive Committee, as I recall it, and when the court says, as it does in the text which I have quoted, that the largest creditors of the debtor and the controlling stockholding interests in it requested the appointment of Mr. T. M. Schumacher, it will be understood that this controlling stockholding interest was the plaintiff corporation, namely, the holding company which owned all of the stock in the debtor company.

The Court: This order sort of demonstrates the folly of having some administrative agency 3000 miles away tell the court, which is right here in control of the situation, that it could only appoint two trustees instead of three; so the court has to go through a lot of roundabout motions in order to accomplish that which is obviously the proper thing to have done. Not that it is pertinent to this proceeding, but this order and Judge St. Sure's opinion is very clarifying on that subject.

Mr. Matthew: I think the court's observation is generally pertinent in any event. And may I add this further comment, that we have in this order and in the prior order the explanation, at least a factual explanation for the creation of the so-called dual relationships which existed throughout the trusteeship, and which have been referred to from time to time in the course of this trial. And by the order of the court, paragraph 1, the fourth page, the court orders that T. M. Schumacher and Sidney M. Ehrman be and the same are the trustees of the properties of the debtor, duly appointed by this court and ratified [1010] by the Interstate Commerce Commission.

May I now pass to the next succeeding page and to paragraph 3 of this order:

"That said trustees be and they are hereby instructed and directed to engage Charles Elsey as their agent, to operate and manage the railroad and properties of the debtor."

I now read paragraph 4:

“That said trustees shall have all the title, and shall exercise subject to the control of this court and consistent with the provisions of amendatory Section 77 of Chapter 8 of the Act of Congress relating to bankruptcy, all of the powers of trustees appointed pursuant to Section 44 of said Act, and to the extent not inconsistent with said Section 77, the powers of a receiver in equity proceedings, and subject to the control of this court and jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as it now exists or hereafter may be amended, power to conduct the business of the debtor with authority to them to conduct such business to the extent that they deem advisable in the name of the debtor and by its officers, agents and employees.”

I ask leave to read one further paragraph, which is comparatively brief, and that is paragraph 5:

“That these trustees shall have all the powers, rights, privileges, duties, and obligations heretofore granted to or imposed upon the debtor by the order of this Court entered herein August 2, 1935, and any or all orders supplementary thereto or amendatory thereof, and each and all of the orders heretofore entered in this proceeding shall, except so far as the same are not inconsistent with the express provisions of this order, be of like force and effect with respect to the said trustees and the property of the debtor as though said trustees were therein specifically named in the place of the debtor, all of said orders being hereby incorporated in and made a part of this order by reference.”

I think that paragraph will further respond to your Honor's inquiry as to whether certain authorities conferred by the initial order were likewise carried into effect in the orders appointing the trustees.

I now desire to offer as our next succeeding exhibit the copy of an order signed and filed by the reorganization court on December 17, 1943, entitled "Order authorizing and directing transfer of preferred and common stock of the debtor to the reorganization committee and approving action of the committee in joining in a contract for securing control of such stock and acts of the committee in connection with such contracts."

(The document referred to was thereupon received in [1012] evidence and marked Defendant's Exhibit 23.)

Mr. Matthew: The Court will have in mind that this order is related particularly to an agreement which has been referred to in this proceeding, namely, the agreement dated November 22, 1943, between the Western Pacific Railroad—

Mr. Adams: Plaintiff's Exhibit 11.

Mr. Matthew: Plaintiff's Exhibit 11—between the Western Pacific Railroad Corporation and its secured creditors and the reorganization committee, whereby it is provided among other things that the holding corporation would upon the request of the reorganization committee transfer to the committee or to its nominee all of the stock in the debtor com-

pany held by the plaintiff corporation. The reorganization committee had petitioned the court for the approval of that contract. [1013]

Mr. Matthew: I desire to read into the record at this point a portion of the order of the Court:

“Now therefore it is hereby ordered, adjudged and decreed: (1) That the Western Pacific Railroad Corporation, in order to carry out and make effective the plan of reorganization of the debtor, be and hereby is, directed to assign, transfer and deliver or cause to be assigned, transferred and delivered, to the reorganization committee or its nominee, all of the preferred and common stock of the debtor company, provided that such assignment, transfer and delivery shall be made at the time and place fixed in a written request of the reorganization committee;

“(2) That the action of the reorganization committee in joining in and becoming a party to the agreement dated November 22, 1943, with the Western Pacific Railroad Corporation and its secured creditors, a copy of which was filed with the Court on December 1, 1943, be and the same hereby is, in all respects, approved;

“(3) That the reorganization committee is hereby authorized in its discretion to make written request upon the Western Pacific Railroad Corporation for the assignment, transfer and delivery of [1014] the preferred and common stock of the debtor company and for such other action by the Western Pacific Railroad Corporation as the re-

organization committee may deem necessary or convenient for the purpose of carrying out and making effective the plan of reorganization of the debtor, and the reorganization committee is authorized to accept transfer of such stock for the purpose of carrying out and making effective the plan of reorganization of the debtor.”

I think I need not read the fourth and final paragraph, which is not immediately pertinent to what I have in mind.

May I direct the Court's attention to the fact that the order of the reorganization court entered on March 3, 1944, upon the petition of the reorganization trustees, authorizing the trustees to set aside a reserve fund in the sum of \$7,100,000 for contingent tax liability, has been received of record as Defendants' Exhibit No. 12. May I just state to the Court that for its convenience in examination we have reproduced in the appendix to this memorandum, commencing on page 6, the whole text of that order of the Court. It is very brief, and in its entirety is found on page 6 of Appendix A. I now offer as our next succeeding exhibit a copy of a petition of the reorganization committee filed in the reorganization court on August 23, 1944, entitled “Petition of Reorganization Committee [1015] for an Order Approving Use of the Debtor Company in Carrying Out and Making Effective the Plan Approving Proposed Amendments to the Articles of Incorporation and Proposed New By-Laws of Debtor Company and Approving Forms of Pre-

ferred and Common Stock Certificates, and Directing Action with Respect Thereto.”

Mr. Phleger: I might point out that we introduced that as Plaintiff’s Exhibit 12.

* * *

Mr. Matthew: The Court has heretofore received in evidence as Plaintiff’s Exhibit No. 12 a copy of the petition of the reorganization committee filed on August 23, 1944, for an order approving mortgage indentures and certain other forms, and also for authority to make certain adjustments payments. [1016] I would like to refer to, and quote, one brief paragraph from that petition. This is subparagraph (c) in paragraph 11, and this paragraph relates to the earnings which has been realized from the operation of the properties in the hands of the trustees from January 1, 1939, through the calendar year 1943, subject to the following comments, and certain of these comments are in subparagraph (c), which I read as follows:

“The amount of such earnings for the calendar year 1943 is before deduction of a special funded tax reserve which has been set up in the amount of \$7,100,000. However, after deduction of such reserve, there would still remain the amount of \$11,583,299.07, which would have been available under the provisions of the plan for the payment of full interest on the general mortgage income bonds, the sinking fund requirements and a dividend of 5% on the preferred stock. And after such payment a balance of \$8,929,844.07, available for dividends,

on the common stock and for other corporate purposes, would have remained.”

There has also been received as Plaintiff’s Exhibit 13 a copy of the court order of September 25, 1944, responsive to the petition to which I have just referred, approving the mortgage indentures and other forms, and also authorizing the adjustment payments to which I have previously referred. I would like to quote briefly from that order of the court. This is paragraph 6, appearing upon page 7 of the copy furnished for the record. I now read:

“That the balance of the available net income of the debtor and its subsidiaries for the years 1939 to 1943 inclusive, remaining after the payments directed in paragraph 5 hereof, be applied as follows:

A. \$1,698,562.25 to be credited by the reorganized company to the capital fund account within 30 days after the consummation of the plan; provided, however, that such account shall be reduced prior to, or at the end of, such 30 day period, to \$1,000,000, either by proper charges to such account under the provisions of the plan or by reducing said account by the amount of the excess over \$1,000,000.

B. \$424,360 to be applied to the making of the sinking fund payments required by subdivision L of the plan in respect to the general mortgage, 4½% income bonds, Series A and C; \$20,658,938.92, or the remaining balance of said available net income, to be applied to any proper corporate purpose [1018] of the reorganized company.”

I now desire to offer as our next succeeding exhibit a copy of an order entered by the reorganization court on October 23, 1944, entitled, "Order Approving Designation by the Reorganization Committee Under the Plan of Reorganization of the Debtor of the Trustees, Transfer Agents, Registrars, Scrip Agents, Depositary and Exchange Agent, and Engraver and Printer of Securities, for Purposes of the Plan of Reorganization and Authorizing Agreements or Arrangements Proposed by Said Committee for their Compensation and Expenses."

And if I may continue the offer for a moment, I also offer a copy of the order made by the reorganization court on the same date, namely, October 23, 1944, entitled "Order Making an Allowance to be Paid out of the Debtor's Estate for Certain Expenses Incurred and to be Incurred in Connection with the Proceedings and Plan or Reorganization by the Reorganization Committee."

I think I should state to the Court and to counsel that I attach no particular significance to either of these two orders. They are offered for the record merely for the purpose of accounting for them in this respect: In the final order of the court terminating the proceedings, there is a reference to a reservation of authority over expenses made by an order of the court entered on October 23, 1944; so without these two orders in the record we might not have fully accounted [1019] for the orders which are referred to by certain dates or otherwise in the final order of the court. For that purpose

only I offer these two orders to which I have just referred.

The Clerk: Are you offering them as one exhibit?

Mr. Matthew: Well, I would think it might be preferable to have them given separate exhibit numbers, but I will defer to the custom. I think they could be designated separately. They are companion orders.

The Clerk: 24-A and -B.

(Orders of reorganization court of October 23, 1944, were received in evidence and marked Defendants' Exhibits 24-A and 24-B.)

Mr. Matthew: The Court has also heretofore received as Plaintiff's Exhibit No. 14 a copy of the court order of November 27, 1944, directing the revesting of the debtor's property in the reorganized company and authorizing and directing the carrying out of the plan. I ask leave of the Court to quote rather extensively from that order. It is one of the most important orders in the reorganization proceeding. It is very important, or has a direct bearing upon various issues in the case—particularly upon the defenses predicated upon the bars of the reorganization proceedings. [1020]

* * *

I would like to read first a brief paragraph, (e), in the preliminary findings of the court in this revesting order, November 27, 1944, subparagraph (e), reading as follows:

“The proposed agreement attached to this order as Exhibit D provides for the assumption of obligations, liabilities, contracts, agreements and leases which are to be assumed by the reorganized company pursuant to the plan of reorganization. It is consistent with and conforms to the plan of reorganization and should be approved.”

I now read a part of paragraph 9 of this order:

“The Western Pacific Railroad Company shall assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by the debtor’s trustees and remaining in effect on the date of the actual delivery of possession by said trustees and the actual termination of the responsibility of the debtor’s trustees for the operation of the debtor’s properties as hereinafter provided in this order, and which have heretofore been assumed [1024] or not disaffirmed by said trustees which remained in effect on December 31, 1944, together with the expenses of this reorganization as allowed by the court within the maximum fixed by the Interstate Commerce Commission.”

Now I come to a later portion of this same paragraph 9 of the order, being a part of subparagraph (e), and before I undertake to read that text, may I ask the Court to have in mind that included in the text is a reference to the agreement of assumption and certain language of the order which we think is very pertinent as to its meaning and effect. I now read:

“And, further, without limitation of the generality of the obligations hereinabove imposed upon the Western Pacific Railroad Company, that company shall (a) specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933”—I omit some further text there relating to the payment of the coupons, which is not immediately germane to what I have in mind—and also simply refer to item (b), which refers to the payments of taxes to the United States from the debtor or the debtor’s trustees. I now continue: “The above ordered [1025] assumption and adoption shall be evidenced by the execution by said railroad company of the agreement of assumption referred to in paragraph ‘8(a)’ above and of such other instruments of assumption as may be appropriate; and said railroad company shall succeed to all rights, privileges, liabilities and duties of the debtor or the debtor’s trustees under such contracts, leases and agreements; provided, however, that this order shall not be construed as a modification of any former orders of this court barring or settling claims against the debtor or the debtor’s trustees, and said railroad company shall assume only the valid and outstanding obligations and liabilities of the debtor or the debtor’s trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby canceled and discharged, and only such obligations and liabilities

as are preserved under the plan of reorganization and are not limited or discharged by the prior orders of this court."

I will omit reading paragraph 10. I think that paragraph has been reproduced in Appendix 8 to our preliminary memorandum. I do desire, however, to read a portion of paragraph 11:

"The date for the consummation of the plan of reorganization, and the date upon which the first mortgage bondholders and secured creditors of the debtor shall be entitled to receive in exchange for their old securities, the new securities and adjustment payments under the plan, as heretofore approved and authorized by this court, is hereby fixed as December 29, 1944; all of the business, assets and property constituting the debtor's estate, of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as trustees herein, shall vest in and be and become the absolute property of the Western Pacific Railroad Company on said date, free and clear of all rights, claims, liens and interests of said trustees, the former stockholders and creditors of the debtor, and of all other persons, firms and corporations whatsoever, except as is otherwise provided in this order, and the said railroad company shall thereupon be forever released and discharged from all of its debts, obligations and liabilities, except as herein provided;"

I think I need not read further from that paragraph.

May I just refer the Court very briefly to paragraph 15 of the same order, which I need not read. It will suffice if [1027] I characterize it as being the conventional injunction against suit and actions against the reorganized company.

I shall finally direct the Court's attention to the closing paragraph of the revesting order, namely, paragraph 20, which shows the extent to which jurisdiction has been reserved. I shall take only a moment to read it:

“This court reserves jurisdiction for all purposes necessary to put into effect and carry out this order and the plan of reorganization, including, without limiting the generality of this reservation, the right to enter, upon such notice as this court may direct, any further order or orders terminating the right to receive any securities or payments of cash under the plan of reorganization; and this court expressly reserves jurisdiction to determine all costs and expenses of administration, including the amounts to be paid as compensation for services heretofore or hereafter rendered or reimbursement for expenses heretofore or hereafter incurred by the reorganization committee and its attorneys, or by any other person, firm or corporation, in connection with this proceeding and the plan of reorganization, and generally in connection with putting into effect and carrying out the plan of reorganization.” [1028]

I think I need not read further from that particular order.

I think that the ninth and final report of accounting of the reorganization trustees has not yet been offered in evidence. I offer at this time a copy of the ninth and final report and accounting by the trustees of the property of the debtor and petition for approval of their acts and accounts and for their discharge as trustees and for the exoneration of their bonds filed in the reorganization court on April 30, 1945, and I ask that it be received as the next succeeding exhibit number.

(The document referred to was received in evidence and marked Defendants' Exhibit 25.)

Mr. Matthew: I offer next copies of the court order of May 21, 1945, approving the ninth and final report and accounting of the reorganization trustees and discharging them as trustees, signed and filed on May 21, 1945. I think that a copy of that has not yet been received in evidence, although reference has been made to it. I see that I failed to bring a copy of that particular order with me. Might I ask the Court for an exhibit number at this time and to produce it at the next session of the court on Tuesday?

The Court: Very well.

(The document referred to was received in evidence and deemed marked Defendants' Exhibit 26.)

Mr. Matthew: I now offer a report of the reorganization [1029] trustees filed in the reorganization court on May 21, 1945, entitled briefly, "A Re-

view of the Operations of the Company's Railroad in the Jurisdiction of the District Court of the United States for the Northern District of California During Proceedings for Reorganization under Section 77 of the Bankruptcy Act, August 2, 1935, to December 31, 1944."

Copies of this report were transmitted to all parties of record to the reorganization proceeding and to all counsel for the parties, as shown by an affidavit in our files. May I state that this is a rather convenient review of the entire period of the trusteeship, which was received by the court at the time when the trustees were heard upon their petition for the approval of their ninth and final report and accounting and for their discharge. It has in it likewise certain historical matter which may be of some interest to the Court. I do not offer it for any but a single purpose. I desire to offer it for the text appearing on pages 43 and 44 under the title "Income and Excess Profits Taxes 1943 to 1944."

Mr. Phleger: May it please the Court, I do not think this should be admitted in evidence. It is a printed document of some sixty pages or over. It is not a document upon which the court acted at all. I am willing, if counsel so states, to agree that the two paragraphs he refers to were in fact filed by the court, if that is all he wants to prove by it, but frankly, I have never seen it before and it contains a multitude [1030] of recitals of fact running back for years. I do not know what you seek to

prove, Mr. Matthew. Maybe I can accommodate you by a stipulation.

Mr. Matthew: Well, if the Court please, one of the matters of controversy in this case is the extent to which notice of these income tax returns and the use of the stock loss in the consolidated returns, with the resultant reduction in tax liabilities, has been brought home to the parties in the cause, including particularly the plaintiff corporation and its counsel. We have here a report of the trustees made to the court, reviewing their entire period of service, and again including very specific text about the income and excess profits taxes for the so-called critical period of 1942, 1943 and 1944. I have in my file here an affidavit showing that copies of that report were transmitted on the 22nd day of May, 1945, to a rather considerable list of persons, including the Western Pacific Railroad Corporation, its counsel, Mr. Nicodemus, and, if you will pardon me, Mr. Phleger, a copy also went to your firm, which, as you know, at that time was counsel to, I think, the Reconstruction Finance Corporation, counsel of record. It seems to me whenever we bring home fair notice in these official publications served upon the counsel to the plaintiff corporation and served upon the corporation itself of the essentials of these income tax returns, we have some evidence which is of definite value and important to our defenses. [1031]

* * *

Mr. Matthew: That is it.

The Court: And what gave rise to the discussion was whether or not that notice, at that time, had legal validity; and I take it that you can stipulate, I suppose, that you are only offering that portion of this report on pages 43 and 44, that have to do with the tax matters.

Mr. Matthew: That is true, and I am willing to withdraw my offer of the document in its entirety, if it is desired, because it is perhaps more comprehensive,—but I would like to read into the record at least the text to which I have referred.

Mr. Phleger: Your Honor, I have no objection to his doing that, if he will also state the date on which he states that it [1036] was sent out to this list.

Mr. Mathew: I can give you that date.

Mr. Phleger: I am not admitting its relevancy, your Honor; I will stipulate to it subject to our objection as to relevance.

Mr. Matthew: Well, I have in my files an affidavit or a copy, made on the 22nd day of May, 1945, by——

Mr. Phleger: What is the date?

Mr. Mathew: The date of the affidavit is May 22, 1945, and it recites that on the 15th day of May, 1945, copies of this report were mailed to each of the parties named on this list, and among them are, as I stated, the Western Pacific Railroad Corporation and Mr. Nicodemus.

Now I don't want to carry the argument to the court any further as to what might be the scope of

the jurisdiction of a court, but I am very certain that there is a period in there in which that claim might well have been entertained by the court, and that will require a good deal of discussion when we come to arguing the defenses of the bar.

The Court: Yes.

Mr. Matthew: And I wouldn't want to mislead your Honor as to just how far that argument, or in what respect that argument will go. There are a good many important legal principles and qualifying principles involved. But I do think it is important to our case and perfectly in order, to bring home to the plaintiff corporation and its counsel the fact that at this [1037] particular time a copy of this report was at least sent to them, and that it did have this text, referring to the income and excess profits taxes for the years 1942, 1943 and 1944.

Now is it the court's suggestion that the offer of the entire document be withdrawn, and that I may offer the text to which I have referred——

The Court: I think that would be better, Mr. Matthew.

The Clerk: The offer is withdrawn.

Mr. Matthew: Then I withdraw the offer of the review in its entirety, and I ask leave to read into the record a paragraph found on pages 43 and 44 of the report to which I have referred, under the caption, "Income and excess profits taxes 1943, 1944."

"The income account of the trustees, appendix A,

show that no federal income or excess profits taxes were accrued for the year 1943 or the first four months of 1944. For those periods, as for the several preceding years, tax returns were filed on a consolidated basis by the Western Pacific Railroad Corporation, a holding corporation which was the owner of all of the capital stock of the railroad company until May 1, 1944, when all of said stock was transferred to the reorganization committee as part of the procedure for effectuating the plan of reorganization. The trustees were advised that they had no liability for federal income or excess profits [1038] taxes in 1943 or the first four months of 1944, because of the loss suffered by the holding corporation when the United States Supreme Court finally approved the reorganization plan, which rendered the railroad Company's capital stock 'without equity or value'.

"However, the commissioner of Internal Revenue has not audited the 1943 and 1944 returns, and the reorganization trustees, pursuant to authority of the court, established a reserve fund in the amount of \$7,100,000, to provide against the contingency that some tax liability of the railroad company might subsequently be asserted by the commissioner of Internal Revenue for the year 1943."

Then follows a sentence in parenthesis, reading as follows:

"(The Board of Directors of the company, on March 26, 1945, established an additional reserve fund in the amount of \$3,000,000, to cover a similar

contingency in respect of the first four months of 1944)''.

Mr. Phleger: Just a moment; I am puzzled. That recites that the returns have ben filed for '44, but have not yet been audited. According to the dates you gave, Mr. Matthew, that was sent out a month before the 1944 returns were filed.

Mr. Clark: That is exactly what I was going to say.

Mr. Adams: After the tentative returns and before the final returns had been filed.

Mr. Phleger: How could they be? Well——

Mr. Clark: No, this language is, may it please, your Honor, "The income account of the trustees, appendix A, shows that no federal income or excess profits tax were accrued for 1943 or the first four months of 1944. For those periods, as for several preceding years, tax returns were filed on a consolidated basis by the Western Pacific Railroad Corporation, a holding corporation, etc.,——"

Now this document, so reciting, went out according to the date given by Mr. Matthew, on May 15; but the returns which it recites were filed for the four months of 1944 were not actually filed until June 15 of 1945. In other words, they hadn't been filed at the time this was so reported.

Mr. Adams: Well, now, counsel will stipulate, no doubt, your Honor, that the tentative returns—and that tentative return was a tentative return of the plaintiff corporation for the year 1944—were filed in March, 1945?

Mr. Clark: No, the only return we know about is the one filed on June 15, 1945.

Mr. Adams: Well, we are speaking of the final return.

Mr. Clark: Right. For the first four months of 1944.

Mr. Phleger: No, I think there was an extension of time; but no returns were filed. [1040]

* * *

Mr. Adams: Now, if your Honor please, if I might interrupt for a moment so that we might have the record correct; and I think counsel, if I call counsel's attention to Interveners' 80, a document not in the record in this case, but taken upon depositions, that we can get a stipulation without the necessity of introducing Interveners' 80.

Mr. Clark: Wait just a moment until we get it.

Mr. Adams: Please do. Look at the second paragraph.

Mr. Phleger: I think that the exhibits in evidence will show that an extension to file the returns was granted contingent upon tentative returns being filed; so I would assume they were filed.

Mr. Adams: I made a statement, and I would like to get the statement and the record cleared up.

Mr. Phleger: I think it is right in the record now, Mr. Adams, in the exhibits which we introduced, and the 1944 tax return. It is included in there. [1041]

Mr. Adams: Well, if your Honor please, may I

simply have the record cleared up right now, and I think it can be if counsel, all of whom want to have the facts correctly stated, will refer to Interveners' Exhibit 80. I think they will find confirmation, this being a telegram of March 1, 1948, speaking of the fact that "There is to be filed a tentative consolidated return for the corporation for the entire year, including its subsidiaries to May 1."

I think your Honor will find, if counsel will agree, that that was the procedure that was followed.

Mr. Clark: Well, I think maybe your Honor would find it best simply to put this——

Mr. Phleger: I don't think you have to do that. The exhibit in evidence shows the application for extension of time, and it shows the tentative return. This is Plaintiff's Exhibit for the year 1944.

Mr. Adams: Yes, and the tentative return filed covered the corporation for the whole year and the subsidiaries for the first four months.

Mr. Phleger: Correct.

The Court: So that when they refer to this excerpt that Mr. Matthew has been reading from to a return for 1944, they are referring to a tentative return, rather than the final return?

Mr. Phleger: Yes.

Mr. Adams: Well, I think the significant fact is, your [1042] Honor, that the tentative return was a return of the holding company for the whole year and for the subsidiaries for the first four months; so that that had become a determined procedure before this report was put out.

Mr. Matthew: May I just make this further comment, without encroaching upon your Honor's patience further? Irrespective of any possible inaccuracy in that particular statement as to the 1944 returns, of course the important and significant part of this text is that the part which relates to the fact that the stock loss of the holding company was used in the returns, with a resultant deduction in tax liability——

The Court: You have read that part, Mr. Matthew, and called attention to the fact that it was included in this report and then the report was mailed out to the various persons whom you named.

Mr. Matthew: Yes. May I just add this, if your Honor please: I haven't responded fully to your Honor's inquiry as to the powers and jurisdiction of the reorganization court and other courts, but in due course I know we will bring to your Honor many authorities which deal with the question of jurisdiction, and to what extent that jurisdiction may be reserved or has been reserved, and it would take a fairly considerable time to deal with those issues right now. So I trust your Honor will understand that in due course we will cover that field very fully. But we think that this particular text, having been [1043] brought to the attention of counsel for the plaintiff corporation and the corporation itself, as of the date shown, is pertinent to the case. I take it that your Honor may desire to adjourn at this time?

The Court: You have some more documents that you are going to put in, Mr. Matthew?

Mr. Matthew: Yes, but they would take some little while. May I suggest this, if your Honor please: We would like to offer for the record the chart which has been prepared by us and which has been hanging in the courtroom, and which counsel have no doubt examined, that of reorganization and tax chronology from 1935 to 1947. I think that every order therein listed has been covered, either by exhibits offered by plaintiffs or interveners or by defendants, with the exception of the closing order, March 28, 1946. Reference has been made to that order, and it will be offered. I think that the data on the chart is correct, at least as to the best of our knowledge and belief, and I simply call to the Court's attention the fact that in the scheme on the left-hand side of the chart we segregate the operations in 1935 with the debtor in possession, from the succeeding operations by the reorganization trustees to the end of 1944, followed by the period mentioned in 1945 when the property was revested, and thereafter operated by the reorganized company. We would like to offer that chart in evidence.

Mr. Phleger: May it please the Court, we will check that [1044] over the week-end; I don't know, I haven't examined it. Perhaps it is all right, but we would like to look at it. We probably will be able to stipulate.

The Court: You are offering it as a summary of the evidence offered by the defendant?

Mr. Matthew: Yes, to the extent that it appears on the chart. We have here a chronology of significant orders and significant events which we think will be helpful to the Court.

The Court: I will admit it for the same purposes I admitted the plaintiff's chart and to the same extent; and if you want to correct anything on it, you may correct it.

The Clerk: 27.

(Chart referred to, defendants' reorganization and tax chronology from 1934 to 1947, was received in evidence and marked Defendants' Exhibit 27.) [1045]

* . * . *

Mr. Matthew: If the Court please, may the record show that I have this morning handed to the Clerk for incorporation into the record a copy of the court order of May 21, 1945, approving the ninth and final report of the reorganization trustees and discharging them as trustees. I offered that report at Friday's session, the offer was accepted and the court assigned Exhibit No. 26 to it. I now furnish a copy for the record and have likewise furnished copies to counsel.

The Court will recall that toward the close of the last session, we offered and the Court received as Exhibit No. 27 the reorganization and tax chronology chart covering a period from 1935 to 1947,

which hangs upon the easel here in the courtroom (indicating).

May I call the Court's attention at this time to a further chronology which has been incorporated as Appendix B in the defendant Western Pacific Railroad Company's preliminary memorandum. That chronology is a little more comprehensive than the chronology which appears on Exhibit No. 27. The Court will notice that it has been prepared in two parallel columns, the one to the left being identified as the chronology of reorganization proceedings and the one on the right in red type, being [1046] identified as the chronology of tax returns and related occurrences.

We believe that the chronology there shown is accurate and since it is somewhat more complete, that is, has more detail in it, than the chronology appearing on Exhibit No. 27, we think the Court will find it available for convenient reference and have some assistance from it in that respect.

We would now request that the opinion and order of the Interstate Commerce Commission approving the plan of reorganization of the Western Pacific Railroad Company, issued under date of June 21, 1939, given docket No. 10913 and reported in 233 I.C.C. 409, be deemed to be a part of the record in this proceeding. I am inclined to think that that was the intent of counsel for the plaintiff in referring to the Commission's report and order. He quoted briefly from it. As I understood, the implication at least of his observation was, that that was his thought at the time.

Mr. Phleger: That was our intention.

Mr. Matthew: Yes, very well.

Now that is understood, we are content. And may I also suggest in that connection that the earlier opinion and order, the Interstate Commerce Commission in the same proceeding—that is, the opinion and order dated October 10, 1938, and reported in 230 I.C.C. 61—be likewise deemed a part of the record in this proceeding. [1047]

I make that request particularly because that is in some respects a little more comprehensive as to history of the Western Pacific Railroad Company and of the reorganization proceeding. Of course the plan which was originally promulgated in that earlier report was modified by the later order of the Commission to which I have already referred.

Mr. Phleger: No objection.

Mr. Matthew: Very well.

I now offer a copy of the Court order of Feb. 21, 1944, entitled, "Order providing for hearing upon petition for authority to establish reserve fund for contingent liabilities." The Court will have in mind that the petition of the trustees is in evidence as plaintiff's Exhibit No. 58 and that the court order granting the petition for the establishment of the fund is in evidence as Defendant's Exhibit No. 12. We would also like to have in evidence this court order of Feb. 21, 1944, providing for a hearing upon the petition and fixing a date for it.

The Clerk: Exhibit 28.

(Court order dated Feb. 21, 1944, referred to above, was thereupon received in evidence and marked Defendant's Exhibit 28.)

Mr. Matthew: Now may I request a stipulation from counsel that on the 23rd day of February, 1944, copies of the petition of the trustees in this matter, together with copies of the order providing for a hearing upon the petition, just received as Exhibit No. 28, were mailed to all parties of record, including [1048] the Western Pacific Railroad Corporation, as well as to counsel, including Mr. Nicodemus and Judge Sloss. I am prepared to make that proof, but I think counsel may be willing to accept that as a stipulation.

Mr. Phleger: We will.

Mr. Clark: So stipulated.

Mr. Matthew: We now offer a copy of the court order of December 11, 1939, granting the petition of intervention of the Western Pacific Railroad Corporation.

The Clerk: Exhibit No. 29.

(Copy of court order dated December 11, 1939, referred to above, was received in evidence and marked Defendant's Exhibit No. 29.)

Mr. Matthew: May I say, with the approval of Court and consent of counsel, that this order granting the petition of intervention of the Western Pacific Railroad Corporation was made upon the petition of the Western Pacific Railroad Corporation, which was filed by Judge M. C. Sloss of the

firm of Sloss, Turner & Finney, on December 7, 1939; order granting leave to file the petition of intervention was dated December 7, 1939. I think it is unnecessary to offer for the record either the petition of the corporation to which I referred or the preliminary order made by the Court granting leave to file it. Is that statement acceptable to counsel?

Mr. Clark: Yes, indeed. [1049]

Mr. Phleger: Yes.

Mr. Matthew: That last exhibit——?

The Clerk: That last number was 29.

Mr. Matthew: We next offer a copy of the petition of the reorganization committee for approval of their expenses and for a final order discharging the committee and terminating the proceedings in the reorganization court, filed in the reorganization court on March 18, 1946.

The Clerk: Exhibit 30.

(Copy of petition and order of March 18, 1946, was thereupon received in evidence and marked Defendant's Exhibit No. 30.)

Mr. Matthew: I next offer a copy of the order of the court entered on March 18, 1946, entitled, "Order providing for hearing upon petition of reorganization committee for approval of their expenses and for a final order discharging the committee and terminating the proceeding.

Mr. Phleger: This is the committee, as distinguished from the trustees?

Mr. Matthew: Oh, yes, and the petition which has just been received in evidence is a petition of the committee.

Mr. Phleger: I understand, correct.

Mr. Matthew: And this is the order of the court providing for a hearing upon the petition.

The Clerk: No. 31.

(Court order dated March 18, 1946, was thereupon received [1050] in evidence and marked Defendant's Exhibit No. 31.)

Mr. Matthew: I desire now to offer a copy of the final order of the reorganization court, responsive to the petition which has just been received, signed on March 28, 1946.

The Clerk: Exhibit 32.

(Final order signed March 28, 1946, was thereupon received in evidence and marked Defendant's Exhibit No. 32.)

Mr. Matthew: The Court may recall that I had in mind perhaps reading some portion of the text of the final order which has just been received; but it seems to me upon reflection that the Court's observations in that connection are well advised, and now that we have physically in the record a copy of that final order, it will serve no useful purpose and would simply be time-consuming to read any part of the text of that order into the record. But may I call the Court's attention to the fact that we have reproduced in Appendix A to the preliminary memorandum of defendant, the Western Pacific

Railroad Company, certain portions of the text of that final order appearing upon pages 11 to 14 inclusive of Appendix A. Of course the Court will understand that we rely upon the entire text of that final order.

May I state to the Court that we have no further documentary material to offer at the present time from the record in the reorganization proceeding. It is possible that we might hereafter ask leave to supply additional documentary material [1051] from that record, but as we are presently advised, we have nothing further in prospect to offer from that record.

Mr. Adams: If your Honor please, upon the opening day's session of court, your Honor inquired (the reference is page 11 of the transcript) with regard to the effect of the plan upon the elimination or reduction of creditors' claims. At that time I made a response which was inaccurate, and I would like to correct it. I refer to the statement beginning at the bottom of page 11 and over on page 12, and particularly the statement on page 12, lines 10 to 13, in my response, which I stated, "One of the secured creditors, the A. C. James Company, was not fully paid." That is correct. Then I said, Page 12, lines 10 to 13, "The amount is not decipherable from the decision of the Supreme Court or the Interstate Commerce Commission. I think that is a correct statement."

Now the fact is, your Honor, having looked at this further, the precise amount by which the A. C.

James Company was not paid is, I believe, decipherable from the record; and I have prepared a memorandum on one page quoting paragraph 5 of paragraph P of the plan as prescribed by the Interstate Commerce Commission and then stating certain figures; that is to say, the figures that appear in paragraph 5 as to the amount of the claim of the A. C. James Company and as to the securities allotted to that company with a calculation showing the amount of the claim, principal and interest, to January 1, 1939, which was the date of the plan, exceeded by approximately three and a half million dollars the securities received by that claimant, giving to the bonds and preferred stock that claimant received, par value, and assigning to the common stock that claimant received the value of \$62 a share, which was assigned to the stock in the Interstate Commerce Commission plan. And I should like to offer this as being identified as a single sheet which I have described, as our computation, numbered Defendant's Exhibit No. 33, and I will hand copies to counsel upon the understanding that counsel, of course can check and correct if they should find any errors or inaccuracy in the statement that I offer. [1053]

Mr. Phleger: May it please the Court, this is simply a computation. The material is in the record. I suggest that it is proper material to be included in their brief, not a matter of proof at all.

Mr. Clark: Or in the form of a memorandum simply handed up to your Honor, but not an exhibit. It is all in the record.

Mr. Adams: It would be a matter of convenience to the Court. I suppose that is why I handed it in.

The Court: You have these summaries in already, which perhaps is not altogether proper evidence, but it may be admitted as a computation subject to correction.

(The computation referred to was received in evidence and marked Defendants' Exhibit 33.) [1054]

* * *

May I call Mr. Ehrman.

SIDNEY M. EHRLMAN

called on behalf of the defendants; sworn.

The Clerk: Will you state your name to the Court.

The Witness: Sidney M. Ehrman.

* * *

Direct Examination

By Mr. Adams:

Q. Mr. Ehrman, you are a resident of San Francisco and you are the senior member of the attorneys' firm of Heller, Ehrman, White & McAuliffe? A. Yes.

Mr. Adams: If you will pardon my going ahead with this rather rapidly, I think perhaps I can save time, your Honor, in stating what I have in mind by way of leading questions on this subject.

The Court: All right.

(Testimony of Sidney M. Ehrman.)

Q. (By Mr. Adams): How long have you been engaged in law practice, Mr. Ehrman?

The Court: Why don't you make a general statement?

Mr. Adams: Very well, I shall, your Honor.

The Court: Just state what you want to show.

Mr. Adams: Mr. Ehrman has been engaged in the law practice since 1897. He has been a director of numerous corporations, including banking and financial institutions, and has frequently dealt with business and financial matters, reorganizations and the like. He has served for many years on the finance committee of the Board of Regents of the University of California. In the course of his practice he has had occasion to consider the effect of taxes upon corporate and business transactions, and I might ask Mr. Ehrman this question:

Q. How frequently would you say that you consider such tax [1057] effects?

A. I should say in the last twenty years particularly, and before that, the tax effects would have to be weighed in almost every corporate matter that was under consideration where money was involved, and particularly in the matter of consolidations and mergers and other corporate procedures of a like nature.

Mr. Adams: May I add this further, your Honor: Mr. Ehrman has been a director of the California State Chamber of Commerce for ten years, and during the same period chairman of

(Testimony of Sidney M. Ehrman.)

the statewide Tax Committee of the California State Chamber of Commerce. He was one of the reorganization trustees in the reorganization of the Western Pacific Railroad Company, serving as such from his appointment, November 9, 1935, until his discharge, May 21, 1945, and he and his co-trustee, Mr. Schumacher, during that period had charge of the operation of the railroad until the end of 1944, when the railroad property was reconveyed to the reorganized railroad company.

Q. And it is the fact, is it not, Mr. Ehrman, that during that time Charles Elsey as the trustees' agent selected by the court was in direct charge of the operation of the railroad under the trustees?

A. That is correct.

Q. Did you seek appointment, Mr. Ehrman, as reorganization trustee of the Western Pacific Railroad Company? A. No, I did not. [1058]

Q. Who first suggested to you that you become one of the trustees?

A. His Honor Judge St. Sure.

The Court: I was just going to answer that question for you. I happen to know about that, not at the time, but Judge St. Sure told me about it. Judge St. Sure did not care very much about Mr. Ehrman, so that is why he appointed him.

Is that right?

The Witness: Yes. When I came to the office a little after nine o'clock I had a message there that Judge St. Sure wanted to see me. As a mat-

(Testimony of Sidney M. Ehrman.)

ter of fact, I inquired around whether anything was wrong with any cases we had pending before Judge St. Sure. I hadn't the slightest notion that a petition had been filed by the Western Pacific Railroad Company. He sent for me and then he told me he would like me to act as one of the trustees; Mr. Schumacher would be the other. That is the first I knew about it, and that is how it came about.

Mr. Adams: Your Honor, may I also ask counsel to follow these statements I am about to make about Mr. Ehrman's financial disinterest in the Western Pacific:

At no time during his trusteeship did he have any financial interest in the Western Pacific Railroad Company or any of its subsidiaries. Mrs. Ehrman had some Western Pacific bonds, but she sold those at the time he became a trustee. At no time during his trusteeship did he have any financial interest in the [1059] Western Pacific Railroad Corporation. At no time during his trusteeship did he have any financial interest in the Metropolitan Life Insurance Company, the Prudential Life Insurance Company, the Chase National Bank of New York, or the Central Hanover Bank. At no time during his trusteeship did he have any financial interest in the A. C. James Company or the Curtis Southwestern Corporation or Company or any company of Arthur Curtis James or any financial interest in the business or investment affairs

(Testimony of Sidney M. Ehrman.)

of Mr. James or the James Foundation of New York, Inc. At no time during the trusteeship did he or his firm at any time represent or act as attorneys for any of the companies I have named or for Arthur Curtis James. At no time during the trusteeship did Mr. Ehrman at any time have any personal interest, financial or otherwise, in any matter or transaction with which he dealt as trustee or any interest or representation in such matters other than the performance of his duties as trustee.

I take it that is all agreeable to counsel?

Mr. Clark: It is conceded.

Mr. Phleger: Yes.

Q. (By Mr. Adams): Mr. Ehrman, throughout your trusteeship did you exercise your independent judgment regarding all matters with which you dealt as trustee? A. I did.

Mr. Adams: May I read further, your Honor, and I will tell [1060] counsel the next point, that is, Mr. Ehrman's non-participation with respect to the plan of reorganization. I will read this briefly. At the beginning Mr. Ehrman made some suggestions to Mr. Schumacher regarding provisions of the original debtor's plan. Thereafter he had nothing to do with the plan of reorganization or plans of reorganization. Perhaps I should ask these questions of the witness.

Q. Did you consider, Mr. Ehrman, that as trustee you were concerned or not with the formulation of the plan?

(Testimony of Sidney M. Ehrman.)

A. I did not think the trustees had anything to do with that; not concerned with it.

Q. Did you consider that the trustees were concerned with the rights of claimants to participation under the plan?

A. I did not quite get that question.

Q. Did you consider that the trustees were concerned with the rights of claimants to participation under the plan? A. No, I did not.

Q. Did you at any time ever take any position as to the rights of any claimants?

A. Not at all. The trustees always tried to maintain an absolutely neutral position.

Q. Mr. Ehrman, who was in the control of the railroad's property and business during the period of trusteeship from November 9, 1935, to the end of 1944?

A. I should say the Court was in control represented by the [1061] trustees.

Q. And to whom did the trustees look for the direction of their conduct as trustees throughout this period? A. The Court.

Q. To whom did they look for advice with regard to business matters in their charge?

A. Mr. Elsey was the agent for operation, and they consulted with him. I do not think they looked for advice on conclusions that were reached. They made their own conclusions.

Q. To whom did the trustees look for advice on legal matters?

(Testimony of Sidney M. Ehrman.)

A. In the first instance to Warren Olney, Judge Warren Olney, Jr., who represented the trustees, and after his death to Mr. Allan Matthew, both of them appointed by the Court.

Q. Mr. Ehrman, will you tell the Court generally what work you did as trustee.

A. Well, I covered a rather wide range. I was in touch with Mr. Elsey, who was operating the railroad, constantly. I suppose I saw him on an average maybe twice a week. I telephoned to him four or five times a week asking him about things. That involved, of course, the reconstruction of the road and a great many details connected with that; the purchase of equipment from time to time, and practically all matters concerned, at least from a statistical standpoint, with the operation of the railroad. I was not an operating man. I would not know how to operate a railroad except on paper. But I kept in touch [1062] with what was being done. In the early part of the reorganization I devoted myself particularly to the financial side of the matter. We had to get money to rebuild that road and we had to issue trustees certificates, and the question was how to sell them and where to sell them and to whom, and I concerned myself with that particularly. I went to New York on it, I think two or three years, when they were sold, and had to be sold over again to new purchasers, until finally Mr. Jones made an agreement with us, with the Reconstruction Finance Corporation,

(Testimony of Sidney M. Ehrman.)

and took over the outstanding certificates, and it continued that way until the end of the trusteeship, although we paid him down some \$7,000,000, I think—\$6,000,000 first, and I think we gave him an extra million afterwards. We could have paid him off, but he wouldn't take it because he had a contract for the bonds.

Q. Mr. Ehrman, did the trustees operate the subsidiary properties, such as the Sacramento Northern and the Tidewater Southern, as a part of the railroad system?

A. I think all of those subsidiaries of the railroad company were included. They were operated, I know, and I spent some time particularly, I think, in considering the Sacramento Northern Railroad. At one time in the beginning of the trusteeship we were seriously considering ceasing operation, particularly passenger operation, and also abandoning parts of the road that were already pretty thoroughly served by the Western [1063] Pacific Railroad. No action, however, was ever taken in that respect, and of course when the war came on there was occasion to use the Sacramento Northern constantly. It was a great help.

Q. Will you state, please, to the Court generally the nature and scope of your contacts with the bankruptcy judge, Judge St. Sure, during the reorganization.

A. I saw Judge St. Sure very frequently during the reorganization, not only when proceedings took place in his court, but at the lunch hour. I

(Testimony of Sidney M. Ehrman.)

felt that I always wanted to report to him what was going on. He was very interested in knowing what was going on, and I wanted him at least to give an assent or not dissent from some of the things we were doing in the operation of the road, spending a good deal of money, and I felt the responsibility and I wanted the Court to know it.

Q. Do you recall any expressions on the part of Judge St. Sure regarding the services of your co-trustee, Mr. Schumacher?

A. Do I recall what? I did not quite get the question.

Q. Do you recall any expressions on the part of the bankruptcy court, Judge St. Sure——

Mr. Clark: We will object to that on the ground it is incompetent, irrelevant and immaterial to any issue in this case. [1064]

The Court: Well, ask him that question. [1068]

The Witness: Did Judge St. Sure know about it? Yes, he knew that we continued the employment of Mr. Nicodemus and his firm, Pierce & Greer, which had existed before the bankruptcy was filed, before the proceeding was filed.

Q. (By Mr. Adams): Now, Mr. Ehrman, there is in the record of this proceeding now paper memoranda showing that in June, 1943, the trustees assumed the whole expense of the New York office from that time forward. Was Judge St. Sure informed of those arrangements at or about that time? A. Yes, I informed him about it.

(Testimony of Sidney M. Ehrman.)

Q. Did he express any disapproval of that arrangement?

A. No. He asked me whether it was necessary to continue the New York office. I said I thought it was necessary for the time being, at least, but the trusteeship would probably wind up within a year, and at that time I thought it advisable to let things stay as they were and let the new company that was going to take over, or the reorganized company, decide what they wanted to do about that.

Q. Now, Mr. Ehrman, were you personally acquainted with Mr. Schumacher before the beginning of the trusteeship?

A. I had met Mr. Schumacher, but not intimately at all. I met him out here when he was working for the Southern Pacific Company.

Q. Did you know his reputation in the railroad industry at the time he was appointed trustee?

A. Yes. He was supposed to be a very experienced railroad man. He had served in many capacities in the Southern Pacific, also in the Western Pacific, and the other James road, the El Paso Southwestern, I think is the name of it.

Q. Now, were your relations with Mr. Schumacher during the trusteeship satisfactory?

A. Entirely so. [1069-A]

Q. Did you form any impression as to his personal disinterestedness and independence of judgment in his conduct as trustee?

(Testimony of Sidney M. Ehrman.)

Mr. Clark: We object to that, may it please your Honor, on the ground it is incompetent, irrelevant and immaterial and calls for the opinion of this witness. There is nothing factual about it.

The Court: I think that is right.

Mr. Adams: Objection sustained, I take it, your Honor?

The Court: Yes.

Q. (By Mr. Adams): And you know, I take it, Mr. Ehrman, that the Western Pacific Railroad Corporation owned all of the stock of the debtor company? A. Yes.

Q. What was your understanding of the function of the New York office of which you spoke a moment ago?

A. The New York office—you mean during the trusteeship?

Q. Yes, precisely.

A. Well, they received copies of all correspondence that was going on. Mr. Schumacher kept his records there, of course. They also attended to freight matters, freight claims and business of that sort. Of course the office was used for interviewing people. When I was east on several occasions I used the office as much as a month at a time—had my office there. And I talked with a good many of those banking investment houses. I would make appointments there for them, sometimes I would go there and [1070] meet them at their place, talking about the sale of trustee certificates, the issuance, rates, all the details. Also equipment trust

(Testimony of Sidney M. Ehrman.)

certificates were issued by the trustees, and the place was used generally as an office. It was used with the Western Pacific Railroad Corporation. They had half of it, they paid half the expense of operating it.

Mr. Adams: Would it be a convenient time, your Honor, to take a short recess?

The Court: Very well, we will take a recess at this time.

(Recess.)

Mr. Adams: Mr. Ehrman, do you recall that in the spring of 1943, the trustees engaged tax counsel? A. Yes, sir.

Q. What was your reason for employing tax counsel at that time?

A. Well, I think that the reason was because matters had grown a little more complex on account of the large earnings that the company was making, and there were considerations for changing over some methods of accounting, and instead of just having our accountants handle it, we thought there ought to be tax counsel.

Q. And whom did the trustees engage?

A. Specifically, Mr. Polk was the man who was in charge. It was the firm, I think, of Whitman, Ransom, Coulson and Goetz.

Q. Did you consider the firm as suitable for the purpose? A. Yes.

Q. And you have said you learned that Mr. Polk

(Testimony of Sidney M. Ehrman.)

was to do the [1071] work. What was your understanding as to his qualifications?

A. I understood he was highly qualified, because I had heard that he had been connected with the Treasury Department, had had experience with the government, and I heard that he had been very successful in handling some most important tax matters for the Consolidated Edison Company and New York, and some other matters, too; that he was very experienced in tax matters.

Q. Now do you recall, Mr. Ehrman, a trip that Mr. Schumacher made to San Francisco in June of 1943? A. Yes.

Q. And an occasion when you met him in Salt Lake on the annual inspection trip? A. Yes.

Q. And that was an inspection trip on which Mr. Elsey and Judge St. Sure and others were traveling, in the annual inspection?

A. In that year, I think it was '43, Judge St. Sure went more than once—but I am quite sure that was the year that he did go, and when we all met at Salt Lake.

Q. Now referring to the time when Mr. Schumacher was here in San Francisco, do you have any recollection of the discussion with regard to the possible use of the corporation's stock loss in the railroad company as an offset to the trustees' taxable income?

A. I don't remember just when that was. I can't place it. But it may have been in June that

(Testimony of Sidney M. Ehrman.)

that was mentioned. It was merely [1072] mentioned; there was no talk about it. But there was a possibility. In other words, I place it some time before the date when we went to court to get authority, and it was definitely determined. There was talk about it, that there was a possibility. Now whether that was in June or some time later that I talked with Mr. Elsey or Mr. Schumacher, I couldn't say. I don't think I could have talked with him until he came out again the next year. But I have a recollection that it wasn't a new matter when I heard it at the time. It was definitely determined upon. Somebody had mentioned to me the possibility that it could be done.

Q. You do have in mind in giving your answer that it was in January of 1944 that that matter was again taken up with you?

A. Yes, it was then definitely. We had been advised by Mr. Polk of the Whitman firm that in their opinion there was a good possibility of a return of that kind being accepted by the Treasury Department.

Q. Now in that connection, Mr. Ehrman, did you give consideration to the establishment of a reserve for contingent tax liability? A. Yes.

Q. And with whom did you discuss that subject?

A. Well, I discussed it with Mr. Elsey and Mr. Matthew—no, I think Mr. Schumacher's was by correspondence. It may have been on the telephone, because I telephoned him on occasions, talked these things over.

(Testimony of Sidney M. Ehrman.)

Q. Now did you have an understanding at that time that tax accruals—that is, the income tax accruals for the year 1943—had been reversed?

Mr. Clark: May I ask, your Honor, what time this is directed toward?

Q. (By Mr. Adams): I am speaking now of the beginning of 1944, are we not, Mr. Ehrman?

A. I understood that that was the period that you last referred to.

Q. And I was directing your attention to the question of your understanding about the fact that the accruals that had been carried on the books for tax liability were reversed, and I was asking you if you had a recollection about that.

A. Well, I think so, but I am not entirely clear.

Q. Now you do have in mind this matter of the reserve to be set up for contingent tax liability?

A. Pardon me, I didn't quite get that. Would you read that, Mr. Reporter?

(Question read.)

A. Yes.

Q. And what was the reason for setting up the reserve, Mr. Ehrman?

A. Well, the reason was that if the government or the Treasury Department refused to accept the theory on which the return was [1074] to be made, mainly, that the losses incurred by the Western Pacific Railroad Corporation could be offset against

(Testimony of Sidney M. Ehrman.)

the gains made by the railroad company or the gains could offset the losses, there wouldn't be the tax.

Q. And at that time did you know, Mr. Ehrman, what the principal loss was that would enter into those returns? A. Yes.

Q. And what was that?

A. That was the loss of the value of the stock of the railroad company.

Q. And whose loss was it?

A. That was the corporation's loss, the Western Pacific Railroad Corporation's.

Q. Now did you understand at that time that any particular kind of return would have to be filed in order to have this loss offset the trustees' income?

A. Yes, it had to be a consolidated.

Q. And filed by what company?

A. By the corporation.

Q. When you say the "corporation," you mean the parent company?

A. The parent company. It had been filed that way right through the trusteeship.

Q. Now you have referred to Mr. Polk's opinion; that was the opinion concerning which you stated he said it was proper to claim that loss in the tax return for '43. Did you rely on his [1075] opinion? A. Yes.

Mr. Clark: Well, does the question refer to the written opinion which is in evidence, may it please your Honor?

(Testimony of Sidney M. Ehrman.)

Mr. Adams: That is plaintiff's exhibit 11, is it?

Mr. Clark: 54.

Mr. Adams: Oh then, I have the wrong paper in mind. Let us look at plaintiff's exhibit 54.

Mr. Clark: Yes, plaintiff's 54 is the original opinion.

(Document handed to Mr. Adams by the Clerk.)

Mr. Adams: And will counsel agree that a print copy of plaintiff's 54, the opinion of January 11, 1944, is contained in the files of Mr. Ehrman, as one of the trustees in reorganization?

Mr. Clark: I will so agree; with the further concession or qualification that Mr. Ehrman received his copy on or about January 24, 1944, as demonstrated by the evidence taken on deposition. Will you accept that?

Mr. Adams: Yes, that is correct; that is my understanding of the matter. That is a correct statement.

Mr. Clark: Very well.

Mr. Phleger: And further, that the letter was signed by Mr. Coulson and not by Mr. Polk.

Mr. Adams: Well, Mr. Ehrman's file copy will only show the firm name.

Mr. Phleger: Well, you have been referring to it as the [1076] "Polk opinion." It was Mr. Coulson's letter.

Mr. Adams: I think you carry it a little too far,

(Testimony of Sidney M. Ehrman.)

but I agree that the signature of the firm name is Mr. Coulson's signature.

Mr. Phleger: That is the point.

Mr. Adams: That is right. (Handing document to witness.)

The Court: I don't think you have any questions now.

Mr. Adams: No, I am waiting for Mr. Ehrman to look at the document.

The Witness: You want me to look at this?

Q. (By Mr. Adams): Mr. Ehrman, look at it as far as need be to answer this question, please: Is this the opinion that you referred to in your answers when you spoke of relying on Mr. Polk's opinion? I am referring, for the record, to plaintiff's exhibit 54.

A. Well, when you asked me about relying on the opinion, I knew there was an opinion. I knew that I had some opinion in my file. I had forgotten about it until I discovered it on the taking of my deposition, that it was there. But I don't recall that I saw this particular document. Mr. Elsey or Mr. Matthew both told me that the opinion had been given by our tax counsel, and I accepted that.

Q. Mr. Ehrman, the record shows, and we have just stipulated, that there is in your files a print copy of that document you have in your hand, and that it was received by you on or about [1077] January 24, 1944, as an inclosure in a letter Mr. Elsey wrote you at that time.

A. Yes.

(Testimony of Sidney M. Ehrman.)

Q. I am showing you that because we have all seen the record. Now with that in mind, would you say that that was the opinion you had reference to?

A. Well, that is the opinion. I think that is the only opinion, as far as I know, that was written by that firm on that subject.

Q. At or about that time?

A. At or about that time.

Q. Thank you, sir. Now, Mr. Ehrman, did it ever occur to you that if the government should allow these returns with the holding company's loss set off against the trustees' income, the holding company would have any claim against the trustees?

Mr. Clark: Object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Adams: Your Honor, as I said in my opinion statement, this claim now before your Honor is an afterthought, and this is a part of the proof of that defense.

The Court: Well, what is the connection between those two statements; the fact that Mr. Ehrman didn't think of, or it didn't occur to Mr. Ehrman, wouldn't have anything to do with whether it was an afterthought of the plaintiff.

Mr. Adams: The fact that it didn't occur to Mr. Ehrman is significant, Your Honor, because had it occurred to either of [1078] the trustees, then the obvious question next would arise, they certainly

(Testimony of Sidney M. Ehrman.)

would have taken it before Judge St. Sure. Now these gentlemen were not acting in a position adverse to the corporation. They were acting as trustees of the court. And in our view, it is part of our defense. [1078A]

The Court: Would the plaintiff be bound by any thoughts or action or inaction on the part of the trustees at all? Assume that they did not consider that there was any obligation on the part of the plaintiff and they proceeded on that ground; it still would not make any difference on the question whether the plaintiff had a right to pursue what it claims as its claim in the case.

Mr. Adams: I am seeking, your Honor, to meet a claim here presented in behalf of our adversaries that the trustees and their lawyers, with no malign or improper purpose, took something of the plaintiff corporation.

The Court: But how Mr. Ehrman as one of the trustees regarded the acts that were done would not have any materiality.

Mr. Adams: I am seeking to show, your Honor, that if by any conception the trustees took—and that is an active performance—anything belonging to these people, they were wholly unaware of it. That is the purpose of this question.

Mr. Phleger: We will so stipulate. We will so stipulate.

Mr. Adams: As regards all parties acting on behalf of the defendant?

(Testimony of Sidney M. Ehrman.)

Mr. Phleger: We will stipulate that Mr. Ehrman did not have any idea of any claim.

Mr. Adams: The stipulation will be acceptable.

Mr. Phleger: I make the further stipulation that he never thought about the subject. I ask you to stipulate to [1079] that, Mr. Adams; not that it did not occur to him, but he never thought about it.

Mr. Adams: I will stipulate that the idea never came to him in anyway, shape or form.

Mr. Phleger: All right.

Mr. Adams: This notion that the corporation could have a claim of the sort now presented in this court never occurred to Mr. Ehrman at any time until after he heard that a lawsuit had been brought in which the claim was asserted, and I take it we are on common ground.

Mr. Phleger: I asked you to stipulate that he never thought on the subject, thought about it at all. Will you so stipulate?

Mr. Adams: I think what I have said is the same thing. How can one think about something which has never occurred to him?

Mr. Phleger: If it is the same thing you will so stipulate, will you not, Mr. Adams?

Mr. Adams: According to my own statement that they amount to the same thing. May I have the same stipulation from the interveners?

Mr. Clark: Certainly.

Mr. Adams: Then certainly the question should be unnecessary, your Honor.

(Testimony of Sidney M. Ehrman.)

Mr. Phleger: And all further questioning of the witness [1080] is unnecessary.

Mr. Adams: Let me see about that. I have not read all my questions yet. I think I can ask this one:

Q. Did anyone ever suggest to you that such a claim might exist?

Do you want to stipulate that no one ever suggested such an idea to Mr. Ehrman?

Mr. Phleger: He is a very bright man and I am sure if they suggested it to him he would know something about it.

Mr. Adams: Then I take it that it is agreed no such suggestion was ever made to Mr. Ehrman prior to the time he heard about this litigation by anyone.

The Court: You have a broader agreement than that already. The idea never occurred to him.

Q. (By Mr. Adams): It was your understanding, Mr. Ehrman, at the time that the holding company was to file a consolidated return, including the stock loss?

A. Yes.

Q. What was your understanding as to who would pay the taxes if any should be assessed?

A. Well, I knew the Western Pacific Railroad Company would have to pay them, because I was told by Mr. Schumacher—that is hearsay—but anyway, I found out as a matter of fact that the Western Pacific Railroad Corporation could not even pay the expenses, the expenses of operating the New

(Testimony of Sidney M. Ehrman.)

York office, so it did [1081] not have funds with which to pay.

The Court: Irrespective of that, of course, the railroad company would have to pay it. It was their income.

Mr. Adams: I think that is right, your Honor. That is our position.

The Court: It would not make any difference what the understanding of anyone was concerning it.

Mr. Adams: The statute prescribes a joint and several liability, but I have no doubt that the parties who would have to pay that tax were those who had the income.

Q. Mr. Ehrman, referring to the taking over of the expenses of the New York office in June of 1943, did you approve of that? A. Yes.

Q. What was your reason for approving it?

A. Well, I approved that because I thought it was to some extent a necessary part of the railroad's operation at that time. Mr. Schumacher felt that he wanted it there, wanted the people who were in that office to continue the functions that they were doing for him as trustee, and in any event there was a short duration expected for the trusteeship and the people who were to follow, the reorganized company, could make up its mind then whether it wanted the office or not.

Q. Do you recall a discussion that you had in San Francisco about that subject?

A. Yes, there was a meeting on that. [1082]

(Testimony of Sidney M. Ehrman.)

Q. Who were the parties at that meeting, as far as you recall?

A. Mr. Schumacher, Mr. Elsey, Mr. Matthew and myself.

Q. In the course of that discussion, Mr. Ehrman, was that matter of taking over the expenses of the New York office in any way related to the income tax problems of the trustees?

Mr. Clark: Will you please fix the time of the discussion?

Mr. Adams: In June of 1943.

The Witness: No, that was something quite different.

Mr. Adams: I have no further questions, your Honor.

Mr. Phleger: I have no questions.

The Court: Any questions?

Mr. Clark: Yes, we have a few, your Honor.

Cross-Examination by Interveners

By Mr. Clark:

Q. Mr. Ehrman, have you ever specialized in income and excess profits tax law, Federal law?

A. Personally I never specialized.

Q. Particularly have you ever specialized in the matter of filing consolidated returns on the part of corporations?

A. No, no, I did not.

Q. In connection with the consolidated return to be filed by the plaintiff corporation for the year 1943, did you personally discuss that matter with Mr. Polk?

A. No.

(Testimony of Sidney M. Ehrman.)

Q. At that time had you ever even met Mr. Polk?

A. To the best of my recollection I only met Mr. Polk once in [1083] my life and that was very casually as he was coming from lunch with Mr. Elsey and Mr. Matthew, I believe, and I was coming from lunch in the Palace Hotel; we happened to meet and I was introduced to Mr. Polk.

Q. But you did not discuss the tax matter with which we are involved here with Mr. Polk at all?

A. I have no recollection of it.

Q. When you say that you relied upon your tax counsel in connection with that matter, do you refer to this opinion that was called to your attention?

A. Yes. Early in the year 1943, I think—it was probably right after, it may have been before the Supreme Court handed down its decision in this Western Pacific case—this matter of having tax counsel taken up, and I was satisfied with it.

Q. From that time on did you rely upon this tax counsel for all tax matters pertaining to the trusteeship?

A. Yes, sir.

Q. In January 1944, Mr. Ehrman, when you agreed to the tax procedure, it was then explained to you—I think you said by Mr. Elsey or Mr. Matthew possibly—did you at that time know whether or not that procedure had been submitted to the directors of the plaintiff corporation?

A. No, I did not know.

Q. Did you give that matter any thought at all?

A. No, I did not give it any thought. [1084]

(Testimony of Sidney M. Ehrman.)

Q. Did you give any thought to whether or not the plaintiff corporation had advice other than the Whitman firm with respect to those matters?

A. I never considered that at all.

Q. At any time, Mr. Ehrman, were you ever advised of the mechanics by which the 1943 return was ultimately filed, that is, who signed it, et cetera?

A. Well, I did not know who signed it. I knew it would have to be signed by the proper officers or some proper officer of the Western Pacific Railroad corporation.

Q. After the reserve fund was finally set up, which the record shows was on March 3, 1944, did you pay any further attention at all to that tax matter?

A. No. I knew of it, but I paid no attention.

Q. There has been put in evidence in this case a refund claim dated March 9, 1945, which was called to your attention on deposition. Do you remember about that?

A. I remember the fact that there was a refund claim put in, but I do not remember any details about it. I did not really concern myself with the tax situation as far as the railroad was concerned.

Q. Were you ever consulted at any time with respect to whether or not a refund claim should be filed?

A. I have no memory of it now, but I would not be a bit surprised——

(Testimony of Sidney M. Ehrman.)

Q. Directing your attention to the date March 9, 1945—— [1085]

Mr. MacKinnon: I submit that the witness should be permitted to answer the question. When he is attempting to answer a question he is interrupted right in the middle of his answer.

Mr. Clark: I merely wanted to call his attention to the date, March 9, 1945. That is the date of the refund claim.

The Witness: That does not ring any bell as far as my recollection is concerned, but I think I heard of the matter, knew that such a refund was to be filed or had been filed. I have some memory of it, but no particular memory of the details or the occasion. That was a refund for 1942, wasn't it?

Mr. Clark: Yes.

A. I know there was such a refund, and I think there was some settlement finally made, when it was finally settled with the Government; they paid something on that year. There was an offset, but whether I heard of that later or not, I do not know.

Q. That was long after the termination of the trusteeship?

A. Long after I was out of office.

Mr. Clark: That is all, your Honor.

The Court: Any other questions?

Mr. Adams: No further questions, your Honor.

The Court: That is all.

Mr. Phleger: Might I direct the Court's attention to a colloquy which occurred with Mr. Adams,

(Testimony of Sidney M. Ehrman.)

and I do not know that you got the significance of it. It is a fact, Mr. Adams, you will stipulate, that when consolidated returns are filed, all [1086] the parties, including the parent corporation, are liable for the entire tax?

The Court: I understand. That is payable to the Government.

Mr. Phleger: That is right.

The Court: As between parties, obviously the person or the company who had the income would have to pay the taxes.

Mr. Phleger: Right.

The Court: May I call Mr. Elsey?

CHARLES ELSEY

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court?

A. Charles Elsey.

Direct Examination

By Mr. Adams:

Q. Mr. Elsey, at this time are you an officer or director of the Western Pacific Railroad Company?

A. No.

Q. When did you retire?

A. December 31, 1948.

Q. Prior to that time, what offices have you held with the Western Pacific Railroad Company?

(Testimony of Charles Elsey.)

A. I was director and president.

Q. You are speaking now of the reorganized concern that came out of the court on January 1, 1945?

A. Yes, sir.

Q. Do you now receive compensation from the company under a retirement plan?

A. I have been advised that the Board of Directors has passed on my pension.

Q. Will you please state to the court the offices which you have held with the Western Pacific Railroad Company, the old company, beginning December, 1907, if that is the date of the beginning, and run through it for the record. [1087]

A. I was elected assistant treasurer of the Western Pacific Railway Company on December 3, 1907, and continued in that office until September 10, 1908. On September 10, 1908, I was elected treasurer and held that office until October 10, 1916. On October 10, 1916, I was elected treasurer of the Western Pacific Railroad Company and held that office to February 24, 1920. I was elected a director on January 8, 1917. I was elected secretary-treasurer on October 24, 1920, and held that office until November 14, 1921. On November 14, 1921, I was elected vice-president in charge of finance, accounting, real estate and insurance. I held that office until May 29, 1929.

On May 29, 1929, I was elected vice-president to discharge the duties of the president in his absence. I held that position until September 3, 1929. On

(Testimony of Charles Elsey.)

September 3, 1929, I was elected executive vice-president and held that office until December 31, 1931.

On January 1, 1932, I was elected president. On November 9, 1935, I was appointed by Judge St. Sure as the managing agent for the reorganization trustees and I held that position until December 31, 1944.

I was elected president of the reorganized company on January 1, 1945, and held that position until December 31, 1948.

Q. Mr. Elsey, have you at any time been an officer or director or held any position with the Western Pacific Railroad Corporation? [1088]

A. No, sir.

Q. During the period prior to the beginning of the reorganization proceedings, by whom were the directors and officers of the Western Pacific Railroad Company chosen?

A. By the Western Pacific Railroad Corporation, the holding company.

Q. Referring to the period of trusteeship, what in general did you understand your responsibilities to be as the managing agent for the trustees?

A. My understanding was that I was fully responsible for the management and operation of the property.

Q. To whom did you consider yourself to be responsible?

A. To the trustees and through the trustees to Judge St. Sure.

(Testimony of Charles Elsey.)

Q. To what extent were you in contact in general with Judge St. Sure during the period of trusteeship?

A. All of our contracts and leases which were to be entered into by the reorganization trustees were submitted to Judge St. Sure through a petition, and those petitions were notice for hearing and I appeared at practically all the hearings before the judge. We had a blanket authority to settle personal injury claims up to a thousand dollars. Anything in excess of a thousand dollars was sent to the judge through petition, and I testified on those matters. We had annual inspections over the property and Judge St. Sure, Mr. Ehrman and occasionally Mr. Schumacher, accompanied me on those trips. [1089]

At times I have discussed matters with Judge St. Sure in his chambers and also discussed various matters with Judge St. Sure and Mr. Ehrman at lunch. We prepared annual reports under my direction. Those reports were filed with the court with petitions. Petitions were noticed for hearing, and after hearing in court they were approved by the judge.

Q. How and to what extent, Mr. Elsey, did you keep the reorganization trustees informed during the period of reorganization?

A. I kept up a very extended correspondence with both Mr. Ehrman and Mr. Schumacher. I would call on Mr. Ehrman at his office and dis-

(Testimony of Charles Elsey.)

cuss various matters, secure their advice and authority on various problems that came up from day to day.

Q. To whom did you look for legal advice during the period of reorganization?

A. I looked for legal advice from the counsels that were appointed by Judge St. Sure. That was Judge Olney and after his death to Mr. Allan Matthew.

Q. Mr. Elsey, during the period of the trusteeship, to what extent were you engaged in discharging any corporate business—and by that I mean business of the Board of Directors—of the Western Pacific Railroad Company?

A. Very little. We had meetings of the board at various times and, of course, we had an annual meeting of our stockholders and issued annual reports, but I spent very little of my time on any corporate matters. [1090]

Q. During the period of trusteeship did you keep yourself informed regarding the business and affairs of the plaintiff corporation and holding company? A. No, sir, not at all.

Q. During the period of trusteeship did you keep yourself informed as to the changes that took place among the officers and directors of the holding company? A. No, sir.

Q. Did you have anything to do with formulating the plan of reorganization? A. No, sir.

Q. Did you have any interest or concern with

(Testimony of Charles Elsey.)

the distribution of securities to be issued by the reorganized company? A. No, sir.

Q. Or with the persons or interests to whom such securities would be issued? A. No, sir.

Q. Have you ever owned any bonds or stocks of any corporation in the Western Pacific group?

A. Yes.

Q. Please state what you have owned and when.

A. I purchased 100 shares of the common stock very shortly after the company came out of the hands of the reorganization. Other than that I own no stocks or bonds of any of the companies affiliated with the Western Pacific. [1091]

Q. During this entire period of trusteeship, Mr. Elsey, is it the fact that you held no securities of either the railroad company or the plaintiff corporation or any other member of the affiliated group? A. That is correct.

Q. During this trusteeship what was your practice with respect to furnishing information when it was requested by parties to the reorganization proceeding?

A. We always furnished any information that was requested just as promptly and just as fully as we possibly could to them.

Q. When did you first become acquainted, Mr. Elsey, with Mr. Nicodemus of the firm of Pierce & Greer?

A. I would say some time during the year 1944.

Q. What relation at that time did you under-

(Testimony of Charles Elsey.)

stand existed between the firm of Pierce & Greer and the holding company?

A. He was their counsel.

Q. What was the relation at that time, according to your understanding, of the relation of the firm to the Western Pacific Railroad Company?

A. He was the New York counsel.

Q. At that time did the railroad company in its San Francisco office have a law department of its own?

A. Yes, sir.

Q. Was the law department continued after the appointment of the firm of Pierce & Greer? [1092]

A. Yes, sir.

Q. Did that firm have anything to do with the legal problems that were handled from the San Francisco office of the company?

A. No, sir.

Q. How often did you see Mr. Nicodemus or his partner, Mr. Campbell?

A. Very occasionally, when I would make a trip to New York. There were times when Mr. Nicodemus came to San Francisco, but I can't recall of ever seeing Mr. Campbell. It is more than likely that I did, but I can't recall.

Q. How often would you say that you sought legal advice from Mr. Nicodemus or his firm?

A. Practically never.

Q. What was the relation, as far as you know it, of Mr. Nicodemus and his firm to the reorganization trustees during the period of trusteeship?

A. Mr. Schumacher requested that Mr. Nico-

(Testimony of Charles Elsey.)

demus be continued as New York counsel; various matters came up that he would like to have the advice of counsel on in New York, and we discussed that matter between Mr. Ehrman and Judge Olney and myself and we thought that Mr. Schumacher's request was reasonable.

Q. Now, Mr. Elsey, you were in court this morning when I was speaking with Mr. Ehrman about the taking over of the expense of the New York office? A. I didn't hear it. [1093]

Q. You recall a meeting held in your office in June, 1943, at which consideration was given to the taking over of the expenses of the New York office?

A. Yes.

Q. I see.

Mr. Adams: And may I have plaintiff's exhibit 28, please, Mr. Elkington?

(Document handed to counsel by the Clerk.)

Q. (By Mr. Adams): Mr. Elsey, I show you plaintiff's exhibit 28 in this case, being a memorandum for file dated June 2, 1943. This is a photostat (handing to witness). Is that photostat a photostatic copy of a record in the office, your office, as president of the Western Pacific Railroad Company during the period of trusteeship?

A. Yes, sir.

Q. Now does the memorandum enable you to fix the time of the meeting at which you say you discussed the taking over of the New York office expense? A. Yes, sir.

(Testimony of Charles Elsey.)

Q. And what is your recollection, as refreshed by this memorandum? A. June 2, 1943.

Q. Now do you have a recollection as to the discussion that took place at that meeting?

A. Yes, sir. [1094]

Q. Please state your best recollection of the discussion—strike that.

First, tell me, Mr. Elsey, who was present at the meeting?

A. Mr. Schumacher and Mr. Ehrman, Mr. Matthew and myself.

Q. And now please state your best recollection of the discussion.

A. Mr. Schumacher came out from New York and was very much concerned about the situation of being able to take care of the expenditures of the New York office. He stated that the holding company was without funds to meet their share of the expenses, and stated that it was very necessary for him to have an office in New York with the organization there to carry out his functions as one of the trustees of the company. And Mr. Ehrman and myself took the position that that request was a reasonable one.

Q. Was anything said at that meeting, so far as you can recall, with respect of the taxes?

A. No, sir.

Q. Was it your understanding that from that time on, Mr. Curry's entire compensation would be paid entirely by the trustees?

(Testimony of Charles Elsey.)

A. That is correct. [1095]

* * *

Q. (By Mr. Adams): Mr. Elsey, before the reorganization began, how were income tax matters handled in the Western Pacific organization?

A. Our general accounting department, which is headed by Mr. D. C. DeGraff, made up the figures for the Western Pacific and its subsidiaries, forwarded them on to New York to the office, the joint office of the holding company and the railroad company, and returns were completed and filed by the New York office.

Q. Throughout what period had this practice of filing the returns as prepared in the New York office been followed?

Mr. Clark: I object to it, may it please your Honor, as including the word "practice," which calls for the conclusion of this witness on a matter which may be of some importance in this case. I have no objection to the development of the facts as they occurred, but when it is described as "practice," that has the connotation that it was somewhat automatic. That point has been discussed before in this case.

Mr. Adams: I submit the question, your Honor.

The Court: Would you read that?

(Question read.) [1096]

Mr. Clark: I will withdraw that objection to that question.

The Court: All right. All right, Mr. Elsey, you may answer the question.

(Testimony of Charles Elsey.)

A. That practice was started in 1918 and continued up to practically the present date.

Q. (By Mr. Adams): What kind of returns were filed during that period?

A. Consolidated income tax returns.

Q. Who selected the officers and employees who prepared the returns?

A. The holding company.

Q. And were those officers and the employees joint officers and employees of the holding company and the railroad company?

A. Yes, sir.

Q. Who was the officer or employee that was directly in charge of the preparation of the returns? A. Mr. Curry.

Mr. Clark: Well, for whom, please?

Mr. Adams: May I proceed with my examination, your Honor?

Mr. Clark: Just a moment. I will object to that, may it please your Honor, upon the ground that it is indefinite. In his capacity as an officer of the company or as an officer of the corporation?

The Court: Well, you can cross-examine on that, counsel. [1097]

Mr. Clark: Very well, your Honor.

The Court: He simply asked for the name of the person. Overruled.

Q. (By Mr. Adams): Now, Mr. Elsey, do you know what practice was followed in regard to the allocation of the taxes between the members of the affiliated group? A. Yes, sir.

(Testimony of Charles Elsey.)

Mr. Phleger: Now, just a moment. I am going to object to any evidence now or hereafter as to what the tax practices were between these parties prior to these critical years, because in the critical years, a situation existed which had never theretofore existed; namely, the severance of the economic unity. They were divorced. They were separate companies. They were strangers, and it doesn't seem to me what their practice had been in previous years has the slightest bearing upon it.

Mr. Adams: Your Honor, may I respond to that argument?

The Court: Yes.

Mr. Clark: We will join in that objection, if the Court please. [1098]

* * *

Mr. Adams: I asked the question generally, over the whole period; of course, if there were some years when there wasn't any tax, that doesn't become involved and is not included in my question. My question was objected to, fundamentally, your Honor. Isn't it right, your Honor, that I should ask the witness about what was done about allocations of taxes? That is the question I put to him. Mr. MacKinnon gives me some help, and I will accept it. May I restate my question?

The Court: All right.

Mr. MacKinnon: Mr. Elsey, in the years during which taxes were paid, under these consolidated returns, what practice was followed in the allocation of the taxes?

(Testimony of Charles Elsey.)

Mr. Phleger: Just a moment. Now will counsel first state the years that he is talking about? Is he talking about '42, '43, '44? And secondly, I make my objection, as I say, upon a fundamental ground that this is irrelevant, incompetent and immaterial. I simply want the record to show it. If your Honor wants the evidence in—I think——

The Court: Well, counsel, I think that is a question I should decide when the case is decided, and not on a ruling on the form of the question.

Mr. Phleger: That is right; we simply want to put our objection. May it be deemed to run to any questions along this subject? [1110]

The Court: I think probably the best way to handle that would be to admit it, and then you can call my attention to it by motion to strike or by argument on the main case, because obviously this has some very definite and substantial bearing upon the defenses which the defendant is asserting, and if the evidence is competent and has weight, why, they are entitled to have it considered in their case.

Mr. Phleger: That is right, but we want simply to have the record show our objection on the grounds stated.

The Court: I think I shall overrule the objection as to materiality and competency of this line of examination, subject to a motion to strike in the ultimate disposition of the case.

Mr. Clark: May we add to the objection, your Honor, this: This witness hasn't been shown to be qualified to testify on the matter of tax allocation,

(Testimony of Charles Elsey.)

and it is not the best evidence—and that if, may it please your Honor, counsel would prepare a schedule of the facts, we possibly can all agree on it without getting the testimony second handedly through Mr. Elsey.

The Court: Well, if Mr. Adams won't object, I think I could reframe the question so as to avoid the difficulty about conclusions in the matter. I think that what you want to ask the witness, if I may suggest it, not as to what the practice was, but in the years in which the affiliated companies paid taxes, how did they divide the taxes?

Mr. Adams: Thank you, your Honor. [1111]

Q. Did you hear that, Mr. Elsey?

A. Yes, sir.

Q. Would you please answer that question?

A. The taxes was allocated among the various companies having a taxable income in proportion to their taxable income. These allocations were made in New York by Mr. Curry, and sent on to our general auditor in San Francisco.

Q. Now so far as you know, within the Western Pacific group, was payment ever made to any member of the group which reported a loss for the tax advantage which its loss conferred on other members of the group? A. No, sir.

Q. To your knowledge, was a suggestion ever made that any such payment should be made to a loss member of the group? A. No, sir.

Mr. Phleger: Well, now, I object to that; it seems to me——

(Testimony of Charles Elsey.)

The Court: That was, "Was any suggestion made"?

Mr. Adams: To his knowledge. I asked him if he knew of any such suggestion ever being made.

The Court: Well, of course that calls for a conversation. There is no foundation laid. I mean, that is too general a question. I will sustain the objection.

Mr. Adams: Very well, your Honor.

Q. Now, Mr. Elsey, after the reorganization trustees were appointed, was there any change in the manner in which the income [1112] tax returns were prepared?

A. No, sir, none whatever.

Q. Was there any change in the matter of the allocation of taxes? A. No, sir.

Mr. Phleger: Now just a moment; that assumes a fact which the evidence shows did not exist; there were no taxes from 1930 until 1942, and he is saying after the trustees were appointed, did they follow this practice of allocating taxes. There were no taxes.

Mr. Adams: Well, your Honor, there were such allocations handled by the trustees in respect of 1929, and of course there were allocations of the 1942 tax. With those two exceptions, I believe Mr. Phleger's statement is correct.

Mr. Phleger: The trustees came in 1935. So what happened in 1929 certainly didn't—

Mr. Adams: Oh, yes, it came before that particular time, that particular matter.

(Testimony of Charles Elsey.)

Mr. Clark: Not in '29.

Mr. Adams: Yes, the matter of the allocation of some taxes for '29. That is the way the Treasury works, many years late. That matter came before the trustees. However, I think the question has been answered, and it is subject to this colloquy, as I understand the record now.

The Court: Well, all right. [1113]

Mr. Adams: And just to clear this record for the benefit of all counsel, I will ask Mr. Elsey a question.

Q. Prior to the year 1942, was there any federal income tax paid by the reorganization trustees for any year during which they were operating the railroad properties? A. No, sir.

Q. Now, Mr. Elsey, what effect—strike that.

You have in mind that the railroad earnings for 1942 were very much greater than they had been in prior years? A. Yes, sir.

Q. And what was the principal reason for that?

A. The war traffic.

Q. Now during that year, did the accounting department of the railroad in San Francisco accrue taxes on those earnings?

A. Yes, sir, month by month.

Q. Did you have anything to do with determining the method of accrual? A. No, sir.

Q. Who had that in charge?

A. Mr. DeGraff, our general auditor.

(Testimony of Charles Elsey.)

Q. Do you know whether the accruals were made on a separate—strike that. [1114]

* * *

Q. Now, Mr. Elsey, speaking now of the accruals for 1942 taxes, do you know whether those accruals were made on the basis of a separate or a consolidated tax return? A. On a consolidated basis.

Q. And do you mean on a consolidated basis with or without the parent company?

A. With the parent company.

Q. Now do you recall that the trustees retained tax counsel to advise respecting the returns for the year 1942? A. Yes, sir.

Q. What were the circumstances that occasioned the employment of these tax counsel?

A. Our large increase in earnings, and the complex new tax law.

Q. And the name of the firm that was employed?

A. What is that?

Q. And the name of the firm that was employed?

A. Whitman, Ransom, Coulson and Goetz.

Q. Do you have any understanding as to who in the firm was to do the work as tax counsel? Did you have at that time?

A. Yes, Mr. Polk.

Q. And on whom did you rely for tax advice after the firm had been employed?

A. Mr. Polk. [1115]

Q. When did you first meet Mr. Polk?

A. June of '43.

(Testimony of Charles Elsey.)

Q. And do you know at whose suggestion he came to San Francisco at that time?

A. It is my best recollection he came to San Francisco at the request of Mr. Schumacher.

Q. Now at this time, Mr. Elsey, I show you Intervener's Exhibit 376.

Mr. Adams: This, your Honor, is a copy of the letter of May 20, 1943.

Mr. Clarke: 53, I think. Just a moment. 53 or 54.

Mr. Phleger: 53 is a letter of 1/8/44.

Mr. Clark: That is not the one.

Mr. Adams: I should have this, and I don't have it, your Honor.

Mr. MacKinnon: 50, Plaintiff's 50.

Mr. Phleger: Yes, that is the paradoxical letter, so-called.

The Court: This is Polk to Curry?

Mr. Adams: Yes, your Honor, that is the one.

Q. Plaintiff's 50 is the original of which this document, Interveners' No. 376, is a copy. And I will hand Interveners' Exhibit 376 to Mr. Elsey (handing to witness) and I ask you if that copy was produced from your files, as president of the railroad company and as agent for the trustees?

A. Yes, sir. [1116]

Q. Now, Mr. Elsey——

Mr. Adams: May the record show that, in referring to Interveners' 376, I am referring to a number assignable to the depositions, and not to the record in this case?

(Testimony of Charles Elsey.)

Mr. Clark: Well, it is a different paper, though, than Plaintiff's 50 in this case, is it not?

Mr. Adams: I have said that.

The Court: It is a copy.

Mr. Adams: Yes.

Q. Now, Mr. Elsey, directing your attention to the legend on page 1, "Recd.," meaning "received," from Mr. "T. M. S." at "S. F." with the "E"; is that Mr. Engelbright's notation? A. Yes.

Q. And who was Mr. Engelbright at that time?

A. My chief assistant in my office.

Mr. Adams: I will offer the document as Defendant's Exhibit 34.

Mr. Clark: No objection from us, your Honor.

Mr. Phleger: It is already in evidence, it seems to me. If they want to offer it as a copy, I suppose that would be all right.

Mr. Adams: That is right. May I see this? My purposes have been accomplished when I produced the fact that the copy of the letter containing that endorsement was in Mr. Elsey's files.

The Court: Well, you brought that out. That is a copy of Plaintiff's Exhibit No. 50. [1117]

Mr. Adams: If agreeable with all counsel, we need not encumber the record with a second copy of the paper, and I will therefore withdraw my offer of the document as an exhibit.

Q. Now, Mr. Elsey, following the time when you saw Mr. Polk in San Francisco in June, 1943, when did you next see him in connection with income tax matters? A. January of '44.

(Testimony of Charles Elsey.)

Q. And where did that meeting take place?

A. In my office in San Francisco.

Q. Now, you had a discussion at that time and place with Mr. Polk? A. Yes, sir.

Q. Will you please state the substance of your conversation with him at that time.

A. Well, Mr. Polk advised me that we were within our legal right in taking the corporation's stock loss as a deduction in our consolidated return. That loss far exceeded our income for that year. He also advised me that we should reverse our accruals for the entire year of '43. I was very much surprised at that statement and asked him if I could bank on it. He said No, that that matter will not be finally decided until the Treasury Department completes their audit on our '43 returns. I then stated to Mr. Polk that if that was a fact, I was going to ask the reorganization trustees to set up a reserve so that we would be protected in the event that the [1118] Treasury Department ruled out the tax loss. I then asked Mr. Polk to furnish me with his written opinion so I could use that opinion as a basis for my recommendations to the trustees, and Mr. Polk also advised me that all of us should be very careful about giving out any misstatements, as that would embarrass him when he had his dealings with the Treasury Department.

Mr. Clark: Now, may it please your Honor, may we have the date of this fixed as nearly as possible, the date of this conversation? I believe it is separable, the exact date, your Honor.

(Testimony of Charles Elsey.)

Q. (By Mr. Adams): Mr. Elsey, do you recall that you have a diary, an office diary?

A. Yes, sir.

The Court: What are you trying to find out, the date he had this——

Mr. Adams: Just the date, that is all.

The Court: How long before you got the opinion from him did you have the talk with Polk?

A. I got his opinion letter—it was either that afternoon or the following day, I think.

Q. Of the day that you had the conversation?

A. Yes, sir.

The Court: Now, does that establish it?

Mr. Adams: I don't think it establishes what we had in mind, what we were all talking about, your Honor. [1119]

Q. Mr. Elsey, the diary date of this talk with Mr. Polk was January 8, 1944, according to your best recollections?

A. Yes, sir.

Q. Now, did you discuss the amount of the tax reserve with Mr. Polk?

A. Yes, I did.

Q. And would you please state to the best of your recollection the time when you discussed that and what was said.

A. That discussion took place at the same meeting I had with Mr. Polk, and that the amount of the reserve should be an amount equal to what our taxes would be if the stock loss was disallowed.

Q. Now, what was your understanding at that

(Testimony of Charles Elsey.)

time as to how the taxes for 1943 had been accrued on the books of the railroad company?

A. On a consolidated basis.

Q. And when you say "a consolidated basis," do you mean with or without the parent company in the group?

A. With the parent company.

Q. Now, Mr. Elsey, do you recall the occasion on which you appeared in the reorganization court before Judge St. Sure and testified in respect of the application of the trustees for permission to set up a reserve fund for contingent tax liability?

A. Yes, sir.

Q. And that was on the 3rd of March, 1944, was it not? [1120]

A. That is correct.

Q. Now, do you recall substantially the testimony that you gave before Judge St. Sure at that time?

A. I do.

Q. And will you please state to the best of your recollection what testimony you gave before Judge St. Sure on that occasion?

Your Honor, before I end that question may I state that all counsel have looked for the transcript and we have not found the transcript.

Could you read the question, please?

Mr. Phleger: But we have found the very written document that he testified from, documents prepared by Mr. Matthew's associate.

Mr. Adams: I have it here in my hand.

(Testimony of Charles Elsey.)

Mr. Phleger: We have no objection to putting it in.

Mr. Adams: Well, is the same true as to other counsel?

Mr. Clark: Yes, indeed it is.

Mr. Adams: I have heretofore been admonished by counsel that I shouldn't show papers to the witness until it develops he cannot remember without them.

The Court: All right. Go ahead.

Q. (By Mr. Adams): Mr. Elsey,—

The Court: This is February 21?

Mr. Adams: This is March 3, 1944, the hearing on that petition of February 21. [1121]

The Court: Oh, yes.

Q. (By Mr. Adams): I show you a memorandum marked "Railroad Company Exhibit 914" on the depositions, and I ask you if this is the memorandum you had with you at the time you gave your testimony in court upon the hearing of that matter. A. Yes, it is.

Q. Did you testify substantially as set forth on pages 2 and following of the memorandum under the heading "Testimony"? A. Yes, sir, I did.

Mr. Adams: Any objection, counsel?

Mr. Phleger: No. We want you to stipulate—

Mr. Clark: No objection.

Mr. Phleger: We want you to stipulate, which is a fact, that the memorandum was prepared by Mr. Matthew's associate and handed to the witness and read from by him when he testified.

(Testimony of Charles Elsey.)

Mr. Adams: Well, I won't stipulate that he read from it; that is not the evidence. I will stipulate that the memorandum is one that was handed to Mr. Elsey in accordance with the standard practice between him and his counsel upon hearing of each matter, so that he would have in his hands a memorandum prior to coming to the hearing; that he studied the memoranda, that he used them in giving his testimony; that that is the case with regard to this one. Will you accept that?

Mr. Phleger: Certainly. [1122]

Mr. Adams: Very well. I offer the document, your Honor, as Defendants' Exhibit 34, being the same document heretofore marked Railroad Company Exhibit 914.

(The document referred to was received in evidence and marked Defendants' Exhibit 34.)

Mr. Adams: And I would like to read your Honor a portion of this memorandum, under the heading "Testimony." This is in the form of questions and answers:

"1. What would be the maximum Federal income and excess profits tax liability for the company if it filed a separate return for the year 1943, according to the computations of the company's accountants and tax advisers?

A. Approximately \$7,000,000.

2. Please explain to the Court why it is believed no tax will be due under the consolidated

(Testimony of Charles Elsey.)

return method of reporting the income and losses of the several affiliated corporations.

A. Consolidated returns have been filed by the debtor company and its affiliated corporations for several years, as permitted by the Federal income and excess profits tax laws. During the calendar year 1943 certain members of the group have sustained very substantial losses, particularly the Western Pacific Railroad Corporation. That company [1123] sustained a very large loss when the stock of the debtor company owned by it became valueless upon confirmation of the Western Pacific reorganization plan in 1943. The aggregate losses of the affiliated corporations for the year 1943 more than offset the net income of the debtor company for the same year."

Then the next answer, or the question:

"Do you believe, however, it is prudent to establish a funded reserve to provide for the payment of any tax which might ultimately be found due?"

A. Yes. I believe a funded reserve should be established for this purpose. Tax questions are seldom free from doubt. While we are confident of our conclusion in this instance, nevertheless, in view of the substantial amount here involved, the Internal Revenue Bureau may decide to litigate the matter. I think the debtor company should set aside out of 1943 earnings a sufficient amount so that it will be able to pay the highest possible tax which might conceivably be found due if the Commissioner should prevail in such litigation."

(Testimony of Charles Elsey.)

Then the next question is:

“What is the attitude of the trustees about the matter? [1124]

A. They have approved my recommendation that we establish a funded reserve of \$7,100,000 out of 1943 earnings of the railroad of the debtor.”

And the last question and answer relates to the investment of the monies.

Q. Now, Mr. Elsey, when you gave your testimony before Judge St. Sure that the amount of the reserve would be the amount computed as if the company were paying a separate return, was it your understanding at that time that that statement was correct? A. Yes, sir.

Q. According to your present understanding, was the statement correct?

A. No, sir, it was not.

Q. In what form would you now make the statement in order that it should be correct, in accordance with your present understanding?

A. I would state that the amount of taxes, or the amount of the reserve, rather, was based on the accrual of our taxes on the basis of a consolidated return with the Western Pacific Railroad Corporation, the reorganizaiton trustees and the affiliates.

Q. Now, when did you learn for the first time of the difference between your statement and what your present understanding of the matter is? [1125]

A. December of '48.

(Testimony of Charles Elsey.)

Mr. Phleger: I don't think he answered that earlier question at all.

The Court: It is not clear to me. I don't know what——

Mr. Adams: Let me hear the answer.

The Court: You asked him what kind of a reserve, or how he would set it up on the basis of what he now knows about it, and I don't know; I couldn't follow the answer. It didn't seem to me to be sequential to the question.

Mr. Adams: May I ask one or two more questions, then, your Honor, and see if we can clear that up?

The Court: Yes.

Q. (By Mr. Adams): Mr. Elsey, you have in mind that at the time you gave your testimony about how the amount of the reserve was fixed, you testified that it was fixed as an estimate of what the tax liability on a separate return basis would be?

A. Yes, sir.

Q. And that you thought that was a correct statement at that time? A. That is correct.

Q. And you learned since that that it was an error, or an erroneous statement?

A. Yes, sir.

Q. Now, then, as a matter of fact, the amount of that reserve authorized by the Court was \$7,-100,000, was it not? [1126] A. Yes, sir.

Q. And how had that amount in fact been estimated?

(Testimony of Charles Elsey.)

A. It had been accrued on a consolidated basis.

Q. So that what you have in mind, then, in telling us that your statement to the judge was erroneous is that the fact is that you had accrued on a consolidated basis, and you told the judge the filing was estimated on a separate return basis?

A. That is correct.

Q. Now, then, until recently did you have any notion that there was any substantial difference in the one figure from the other?

A. None whatever.

Q. And then recently you learned that there was some such difference between one kind of filing and the other? A. Yes, sir.

The Court: There would have been a difference in the figure?

Mr. Phleger: Not as they then thought it.

The Court: Well, the only difference would be if the stock loss wasn't allowed. It wouldn't make any difference whether it was separate or affiliated, would it?

Mr. Adams: I think I can try and answer that briefly, your Honor. Your Honor will recall that Mr. Buchanan handed in two computations, Basis 1 and Basis 2.

The Court: Oh, yes. [1127]

Mr. Adams: Basis 1 was on the separate return liability without certain credits, without them being taken into consideration.

(Testimony of Charles Elsey.)

The Court: Yes.

Mr. Adams: Now, if your Honor please, to calculate on that basis, you would get a different figure from this \$7,000,000 reserve.

The Court: Yes.

Mr. Adams: Does that answer your Honor's question?

The Court: Yes.

Q. (By Mr. Adams): Now, Mr. Elsey, I would like to show you Plaintiff's Exhibit 20-B, being the annual report of the railroad company for 1943 to its stockholders.

(Document handed to witness by the clerk.)

Now, I direct your attention to the text on page 6 of your annual report under the title "Taxes." Do you have that before you? A. Yes, sir.

Q. And of course you have seen that from time to time in the course of your preparation to give your testimony here? A. I have.

Q. It was also directed to your attention upon the taking of your deposition by Mr. Clark?

A. Yes, sir.

Q. Who prepared that text under the heading "Taxes" in that [1128] annual report?

A. Mr. Engelbright.

Q. Did you review it with him? A. I did.

Q. Did you approve it? A. Yes, sir.

Q. I direct your attention to the statement contained in that text, "A consolidated tax return for

(Testimony of Charles Elsey.)

1943 can and will be filed by the holding company."

Do you see that there? A. Yes, sir.

Q. Where did that text originate?

A. In my office.

Q. How did it come to you?

A. From Mr. Engelbright.

Q. What was your basis for approving that statement in the annual report that you have in your hands, Plaintiff's Exhibit 20-B?

A. In the first place, we had filed a consolidated return for a number of years. We were advised by Mr. Polk that we could take the corporation's stock loss as a deduction. I received the authority from the reorganization trustees to set up a reserve. Judge St. Sure approved it. And I assumed that in the ordinary course of events we would file a consolidated return, and it was on that basis that I approved Mr. Engelbright's statement that we can and will file a consolidated [1129] return.

Q. Mr. Elsey, approximately when was this annual report, Plaintiff's 20-B, made public?

A. In July of 1944.

Q. I asked you to bring with you some data with respect to the publication of that report, did I not, and the following reports? A. Yes, sir.

Q. And you have that with you?

A. I have.

Q. Will you please state to the Court the extent and manner in which copies of the annual reports to stockholders for the years 1943, 1944 and

(Testimony of Charles Elsey.)

1945 were distributed and otherwise made public.

A. The annual report for——

Q. May I correct my question before you go further? I will eliminate 1945 and this covers only the 1943 and 1944 reports.

A. The 1943 report, we sent a thousand copies on to Mr. Curry, and on June 28, 1944, we received a telegram from Mr. Curry that he had received the reports and that they would be released on July 3, 1944, and we retained 500 copies in our office, which we distributed out to people such as banks, brokerage houses and various statistical concerns who had requested that they be furnished with a copy of the report.

Of the 1944 report there were 5,250 copies printed and [1130] these were sent out, or the majority of them were sent out to the Central Hanover Bank and Trust Company, who were our stock transfer agents, and we kept quite a number of these reports in our possession here in San Francisco and supplied various inquiries for the same.

Q. Do you know whether or not the Central Hanover sent out the annual reports to the stockholders of record according to its transfer agent records? A. Yes, sir.

Mr. Phleger: When was that report sent out?

Q. (By Mr. Adams): Can you give the date, Mr. Elsey, as to the distribution of that report?

A. No, we haven't got the date that the transfer agent sent the reports out.

(Testimony of Charles Elsey.)

Q. Do you have anything that approximates the release date of the report? That is what we would like to have. A. No, I have not.

Mr. Clark: Do you have the date upon which it was sent to the Central Hanover Bank?

Q. (By Mr. Adams): Do you have any date there as to when it was sent to Central Hanover?

A. No, sir.

Mr. Adams: We will obtain the date for the benefit of counsel.

Mr. Phleger: It is not important. [1131]

Q. (By Mr. Adams): According to your recollection was it sometime approximately in the middle of the year? A. I did not get your question.

Q. Would it be approximately in the middle of the year, according to your best recollection?

A. Yes, sir.

Q. That is, the report for 1944 would have been issued approximately in the middle of 1945?

A. That is correct.

Mr. Clark: The report is in evidence, if it please the Court, and shows it. It has a date on it.

Mr. Adams: It is plain, then. Had we known that, we would not have bothered.

Q. Mr. Elsey, I show you two papers. One of them has been marked Interveners' Exhibit 384 upon the depositions, being a telegram from Mr. Schumacher to you of January 29, 1944, and the other is marked in the depositions Railroad Defendants' Exhibit 909, being a letter addressed to

(Testimony of Charles Elsey.)

you by Mr. Ehrman under date of January 26, 1944. I also show you, Mr. Elsey, Plaintiff's Exhibit 56 in this case, being a copy of your letter to Mr. Ehrman of January 24, 1944, and your original letter to Mr. Schumacher of the same date. Now, referring to the copy of the telegram from you to Mr. Schumacher marked Interveners' 384, is that the telegram you received from Mr. Schumacher on or about January 29, 1944, approving the [1132] recommendation you had made to him in Plaintiff's Exhibit 56? A. That is correct.

Q. And referring to the document now marked Railroad Defendants' 909, Mr. Ehrman's letter to you of January 26, 1944, is that Mr. Ehrman's response to you approving the recommendation you suggested to him as of January 24, 1944?

A. It is. [1132-A]

Mr. Adams: I will offer the two documents I have identified, your Honor, telegram from Mr. Schumacher to Mr. Elsey, and a letter from Mr. Ehrman to Mr. Elsey, as Defendant's Exhibit 35A and B.

(The telegram referred to was thereupon received in evidence and marked Defendant's Exhibit 35A, and the letter referred to was received in evidence and marked Defendant's Exhibit 35B.)

Q. (By Mr. Adams): Mr. Elsey, do you recall a visit made by Mr. Polk to San Francisco and your seeing him in October and November of 1944?

(Testimony of Charles Elsey.)

A. Yes, sir.

Q. Do you recall whether or not you had any discussion with him at that time in regard to the use of the holding company's stock loss in the returns for the year 1944?

A. I do not recall it. More than likely we did, but I can't recall any such conversation.

Q. The record in this case shows that the tentative returns for the year 1944 included a return filed by the parent holding company, which included the railroad company and affiliates for the first four months of 1944. The record shows that tentative returns were filed March 15, 1945, and it further shows that final returns were similarly filed on June 15, 1945. So far as you know, Mr. Elsey, were those returns prepared in San Francisco?

A. No, sir. [1133]

Q. Where were they prepared?

A. Prepared in New York.

Q. Mr. Elsey, prior to February 11, 1947, had you ever discussed with Mr. Polk or anyone in his firm a proposal for settlement of the tax matter with the government?

A. No, sir.

Q. Did you have a discussion of such a proposal on or about February 11, 1947?

A. Yes, sir.

Q. And with whom did you have that discussion?

A. Mr. Coulson.

Q. Where did it take place?

A. In my office.

Q. Will you please state the substance of the

(Testimony of Charles Elsey.)

conversation you had with Col. Coulson at that time and place.

A. Col. Coulson called me at my office about nine o'clock in the morning and stated that he had just received a telephone conversation with Mr. Polk in New York. Mr. Polk had stated that——

Q. Just one minute. I am going to take the liberty of interrupting, Mr. Elsey. You just now said, Mr. Elsey, that Mr. Coulson spoke of having received a telephone call from Mr. Polk in New York. Did you mean that?

A. No, Washington.

Q. Go right ahead. [1134]

A. And, as I said before, Mr. Coulson stated that Mr. Polk thought that the time had arrived to make a compromise offer on our tax matters. That compromise matter would be to forego our 1942 taxes and taxes for the year 1943 and the first four months of 1944 would stand as is. Mr. Coulson advised me that in his opinion it was a good settlement.

Q. (By the Court): You do not mean forego the taxes; you mean forego the refund, do you not?

A. Forego the refund, yes, sir. Mr. Coulson stated that Mr. Polk was very anxious to make that offer as soon as possible. Col. Coulson and I discussed the matter as to whether or not I as the president of the company had the authority to authorize Mr. Polk to make that proposal, and both of us decided that I did not.

(Testimony of Charles Elsey.)

Q. (By Mr. Adams): And then having come to that conclusion, Mr. Elsey, what did you do next in regard to this proposal for settlement?

A. We decided to call our directors, and I got into telephone conversations with our Western directors and also Mr. Haggerty in New York. I advised them of that situation as to what Mr. Polk's proposition was, and they asked me my opinion as to whether or not it was a good settlement and I said yes, and they gave me their concurrence. I tried to get Mr. Bell, one of our directors, but he was on his way to the Hawaiian Islands and I was unable to reach him. [1135]

Q. You spoke of Mr. Haggerty. Mr. Haggerty was at the time a representative of the Metropolitan Life Insurance Company on the board of the Western Pacific? A. Yes, sir.

Q. Following your discussion with the directors, was there a communication then with Mr. Polk?

A. Yes, sir.

Q. Please go ahead and tell about that.

A. I got Mr. Polk on the telephone and told him that I had received the authority from the majority of our directors and also stated to them that Mr. Polk had prepared a letter for me to sign.

Q. You say Mr. Polk had prepared a letter for you to sign?

A. No, Mr. Coulson had prepared a letter for me to sign. I read that communication to Mr. Polk and told him that he was authorized to make the

(Testimony of Charles Elsey.)

proposal and I would sign that letter and forward it to him immediately.

Mr. Adams: May I have Interveners' 10, please?

Q. Mr. Elsey, I show you Interveners' Exhibit 10 in this case and ask you if that is your file copy of the letter to Mr. Polk of February 11, 1947, that you have been speaking about in your testimony? A. Yes, sir, it is.

Q. And did you send that letter to Mr. Polk that day? A. Yes, sir. [1136]

Q. Mr. Elsey, you did learn, did you not, in July of 1946 that a stockholders' suit had been filed in New York in which a claim was stated in behalf of the holding company on account of the so-called tax savings in this matter? A. Yes, sir.

Q. Prior to that time when you heard about that, had it ever occurred to you that the holding company had any financial interest in the tax case with the government? A. No, sir.

Mr. Clark: I object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Phleger: I have no objection.

Mr. Clark: I will withdraw the objection, your Honor.

The Court: You would have to be a Solomon to rule on that. I will cut it in half and allow it.

Mr. Clark: I will withdraw the objection.

The Witness: No, sir.

Q. (By Mr. Adams): Did anyone ever suggest that thought to you? A. No, sir.

(Testimony of Charles Elsey.)

Q. What was your understanding as to who would be required to pay any tax, if there were to be a tax assessed for 1943 and the first four months of 1944?

Mr. Clark: Purely hypothetical and immaterial.

Mr. Adams: I will withdraw it. I think the objection was to the fact that I may be asking a question of law. I do not [1137] intend to.

Q. Mr. Elsey, what was your understanding as to who in fact would pay any taxes for the year 1943 or the first four months of 1944 if they should be assessed?

A. Either the reorganization trustees or the reorganized company.

Q. After Mr. Polk began to work on tax questions in the spring of 1943, did you intend to supervise or direct his work? A. No, sir.

Q. Did you form any opinion with respect to the quality of his work? A. Yes.

Mr. Clark: Just a minute, your Honor. I object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: I will sustain the objection.

Q. (By Mr. Adams): Did you rely on his advice in income and excess profits tax matters?

A. Yes, sir, very much so.

Q. Mr. Elsey, before this suit was filed out here in San Francisco, the present suit now on trial—and that filing was in October, 1946, did you have any discussion with any officer or counsel or repre-

(Testimony of Charles Elsey.)

sentative of the holding company regarding the possible institution of the suit? A. No, sir.

Q. Did any one prior to that time suggest to you that such a [1138] suit might or might not be filed? A. No, sir.

* * *

Q. (By Mr. Adams): Mr. Elsey, when was it decided to close the New York office?

A. The latter part of December, '44.

Q. Who made the decision? A. I did.

Q. When was the New York office closed?

A. April 30, 1945.

Q. What arrangements, if any, were made to take care of the employees in the office?

A. All of the employees except Mr. Curry received severance pay of 50% of their annual wage.

Q. And what provision was made at that time for Mr. Curry?

A. To cover him under our pension plan.

Q. Now it is in the record in the case that Mr. Curry was in receipt of a retainer under an arrangement set forth in a letter addressed to him by Col. Coulson in 1945—June, I believe. How and when did you first learn of the proposal to retain Mr. Curry?

A. Well, after it was decided that we were to close the New [1139] York office, I sent Mr. Droit, our secretary, on to New York with instructions to bring back to San Francisco all files and data that belonged to the railroad company. When Mr.

(Testimony of Charles Elsey.)

Droit returned from New York, he told me that Mr. Coulson had stated to him that if we took all the files back to San Francisco, why, the proposition was that they wouldn't be able to consult these files in connection with this tax matter. So it was decided to leave certain of our files in New York, and as Mr. Curry was the person that was most familiar with the files, he would be retained to assist Mr. Polk as far as the matter of our files was concerned.

Q. And that is something Mr. Droit reported to you upon his return to San Francisco?

A. That is correct.

Q. Mr. Elsey, I show you Plaintiff's Exhibit 32A (presented to witness by Clerk), which is a letter addressed to you by Mr. Coulson under date of April 21, 1945, referring to the arrangement for the retainer of Mr. Curry and referring to certain other matters as well. You received that letter in due course?

A. Yes, sir.

Q. And you examined it, of course?

A. Yes, sir.

Q. Did you approve the arrangement provided for and recommended in that letter by Mr. Coulson?

A. I did. [1140]

Q. Did you consider that \$3,000 a year was a reasonable amount for the purpose?

A. Yes, sir.

Mr. Adams: Now at this time, your Honor, I will take up with Mr. Elsey certain matters having

(Testimony of Charles Elsey.)

to do with our defenses, not narrative in character.

Q. Mr. Elsey, are you familiar with the matter of cut-backs and refunds on the government traffic during the war years? A. Yes, sir, I am.

Q. Can you tell me what those terms mean?

A. Well, when a railroad presents a freight bill to the government, the government pays the bill before it is audited. It takes sometimes several years before the general accounting office gets around to auditing those bills. When they are auditing those bills, they find certain errors. It may be mathematical errors, it might be the wrong rate is applied, or they may contend that that certain shipment shouldn't be entitled to land grant deductions. And when they come to that deduction, they file with the particular railroad a refund claim, and if that refund claim isn't paid very promptly the government deducts the amount that they claim from the next batch of bills that they pay this particular railroad, and those deductions are termed "cut-backs."

Q. Now can you tell me whether the amount of such refunds and cut-backs have been substantial during the war years' traffics? [1141]

* * *

Q. (By the Court): Is that right, Mr. Elsey? Were there some substantial sums involved in that?

A. Yes, sir, very much so.

Q. (By Mr. Adams): Can you give me the approximate amount of the cut-backs and refunds

(Testimony of Charles Elsey.)

which have been made up to a fairly recent date by the Western Pacific Railroad Company on account of Government traffic for the years 1941 through 1944?

Mr. Clark: I object to that on the ground it is not the best evidence, your Honor. There must be records of these things, so we have the actual figures before us.

The Court: Perhaps it is not the best evidence, but I am taking for granted counsel is going to have these accountants testify more precisely on the subject. [1147]

Mr. Adams: That is right, your Honor, and I need this testimony as a basis.

The Court: It is in the nature of preliminary testimony.

Mr. Clark: It is not limited to the period involved.

Mr. Phleger: He says 1941 to 1944.

Mr. Adams: That is right, and the accountants will have to take care of the details. I would like to get an answer to my question as a preliminary question.

The Court: I will allow it.

Q. (By Mr. Adams): Would you like to have the question read, or do you have it in mind, Mr. Elsey? A. Yes, sir.

Q. Will you please answer.

A. Approximately \$2,000,000.

Q. Does that approximate figure include all the

(Testimony of Charles Elsey.)

cut-backs and refunds that may be made on account of traffic for these years? A. No, sir.

Q. What does it include?

A. That figure of approximately \$2,000,000 includes only the cut-backs and refunds that have actually been audited by our accounting department. There are many cut-backs that the Government has made that we contend are wrong. The Government is still auditing our accounts for those years, and I am satisfied, of course, that there will be more of them presented to us. [1148]

Q. Does it include any figure for the account of intermediate war traffic handled by the Western Pacific during those years?

A. No, sir, none whatever.

Q. Will you explain to the Court how it comes about that you have no figure on the intermediate traffic that you handled?

A. It is the procedure that it is the delivering line that makes all the settlements, and where we are the originating carrier or the intermediate carrier, we have nothing to do as far as the settlement with the Government, and when that delivering line receives a cutback from the Government, they will reapportion that cutback to the various lines that participated in the traffic, and our accounting department is unable, when these figures of inter-line accounts come from the various railroads, to allocate that charge against us for any particular shipment. [1149]

(Testimony of Charles Elsey.)

Q. (By Mr. Adams): And Mr. Elsey, can you give me an estimate of the total amount of the Western Pacific cutbacks and refunds on account of Government traffic for the years I have mentioned?

Mr. Phleger: I object to that because it is perfectly obvious that the terms "cutbacks" and "refunds" have been used thus far in the testimony, when the questioning refers to claims by the Government. Just because the Government claims something does not mean that it is the fact. I assume that all the charges the railroad made, it thought it was legitimately entitled to collect.

The Court: What you are trying to elicit is what claims [1155] the Government makes and he suspects there may be more claims made by the Government because he read some place that Congress was investigating the matter and there might be a likelihood of more claims being filed. Can he say anything more than that?

Mr. Adams: This witness?

The Court: Yes.

Mr. Adams: He can tell you that in addition to these figures that he knows about, which he has gotten from his auditor's office with regard to terminal traffic handled, he knows there is going to be more, that he knows there is nothing in those figures for the account of the intermediate traffic. He knows those factors. He knows he has seen this report, and on the foundation of those various

(Testimony of Charles Elsey.)

factors that he knows, he can give me an estimate. I think your Honor will receive an estimate. It only goes to the certainty of it. If he gives you a fair basic statement as to the basic material he has considered in making his estimate, I believe you will receive it. He must be the best informed man there can be produced to ask what additional cutbacks and refunds can be fairly estimated, and that is what I am seeking to get from him.

The Court: Well, I suppose he can say on the basis of the cutback claims that the Government has made, where the Western Pacific was a delivering carrier and thus was directly chargeable with it, that he could compare that amount with the amount in similar cases, where the railroad company [1156] was only an intermediary delivering carrier, and he might on that basis give some estimate. But I don't see what basis there would be for his opinion in any report or Congressional committee, because it might not affect the kind of cases, the subject matter, of transportation involved here, with the Western Pacific.

Mr. Adams: He can answer that question, your Honor; he has read the report. The report describes the kind of transportation he is talking about.

The Court: Well, I will sustain the objection in so far as the witness is called upon to rely upon anything else except the record of his own company.

(Testimony of Charles Elsey.)

Q. (By Mr. Adams): Well, Mr. Elsey, his Honor has said that we can only look to the records of your own company in presenting figures on the aggregate amount of the cutbacks and refunds.

Do I understand your Honor correctly? I don't want to limit myself unless I am sure that I understand your Honor's approach.

The Court: Well, Mr. Elsey, on the basis of the cutbacks upon which claims were made to you by the Government, are you able to make any statement with respect to other similar transactions, with respect to additional cutback claims?

A. Well, I could only say it is a pure estimate. I couldn't [1157] give you any exact figure.

Q. Well, all I am trying to find out is, are you able to make an estimate of some kind on the basis of your own record, the records of your own company?

A. Well, I would say this, your Honor: That we know that we have paid out approximately \$2,000,000, and after reviewing this Bender report and found out the sloppy manner in which the Government accounting office audited these bills, and that the committee has instructed the accounting department to recheck all of these freight bills from the very beginning, I can say to myself that to be a conservative estimate, that we would pay approximately 50 per cent more than we have already paid.

Mr. Clark: We move to strike that out, your

(Testimony of Charles Elsey.)

Honor, as being purely speculative and of no proven validity in this case whatever.

The Court: What is that additional 50 per cent you refer to? Is that another million dollars?

A. Yes, sir.

Q. And what kind of transactions would be involved in that?

A. The same type of transactions that are involved in the \$2,000,000 that we have already paid.

Q. But only with respect to transportation of an intermediate character?

A. No, where we were also as a terminal carrier. Let me give you an explanation, your Honor. This report brings out the [1158] fact that each department in the General Accounting Office was allocated that they would have to review certain numbers of bills per month—a thousand, 2000 or whatever it might be. Particular groups would find out that toward the end of the month they couldn't make that quota. So what did they do but take a bunch of freight bills and stamp them "Audited," and thereby bring up their quota to the demand of the head of the department. Now, those bills are all going to be re-audited again.

The Court: Well, are the bills that you are speaking of, do they involve the same identical rates or other question as the bills upon which you have calculated the \$2,000,000?

The Witness: Yes, sir.

The Court: Just additional ones, is that right?

(Testimony of Charles Elsey.)

The Witness: Yes, sir.

The Court: Now I have asked these questions, and counsel have a perfect right to make the same motions and objections.

Mr. Phleger: Well, they certainly are purely hearsay when this witness testifies that some tired clerk at the end of a month marks something "Audited"; that certainly oughtn't to bind us.

Mr. Clark: On the basis of the very report we have been discussing, your Honor; besides which, the whole thing is speculative. The whole claim hasn't been paid.

The Court: My questions were just directed to find out [1159] the basis on which the witness was going to make the estimate, that is all, rather than as to the admissibility.

Mr. Phleger: Then I move the estimate be stricken out.

The Court: Maybe Mr. Adams would like to develop that further first.

Mr. Adams: Well, I would only ask one question, which I think the witness has already said, but to make sure it is in response to a question:

Q. On the basis of the factors you have considered, Mr. Elsey, what would you say was a reasonable and conservative estimate of the additional amount of refunds and cutbacks for those particular years that will be experienced by the Western Pacific?

Mr. Clark: We object to that, may it please

(Testimony of Charles Elsey.)

your Honor, upon the grounds that it is hearsay, incompetent, irrelevant and immaterial and speculative.

The Court: Well——

Mr. Clark: And that it is of no effect in this case.

The Court: Well, you have, however, from your own accountants proffered testimony as to what the income tax would be if a separate return were filed.

Mr. Clark: Yes, right, on the basis of the figures taken.

The Court: On the basis of the figures that were used in returns that were filed. Now, you do open a door there to the presentation of this sort of thing. The defendants wouldn't be foreclosed, at any rate, from presenting evidence of other factors that might be taken into account in filing separate income tax returns that were not taken into account in the filing of the affiliated return.

Mr. Phleger: Yes, but as of the date when they could not possibly have any effect upon those separate returns, because it is an admitted fact that those years are not open. These are charges that are being made against them now.

Mr. Adams: Your Honor, there is a very ready answer to that: The insistence upon the fact that the consolidated returns are closed. Of course they are closed. They worked out. That is closed. But what we are seeking to prove is what would have happened on a separate return basis. [1161]

* * *

The Court: I will overrule the objection.

(Testimony of Charles Elsey.)

Did you hear the question?

The Witness: Yes. Do you wish me to answer it?

Q. (By Mr. Adams): Yes, please do.

A. I would say that we would pay an additional million dollars.

* * *

The Court: Well, suppose you go along a little bit farther.

Q. (By Mr. Adams): Are you familiar, Mr. Elsey, with the so-called government reparations claims on wartime traffic? A. Yes, sir.

Q. Would you state generally what you understand them to be?

A. The government has taken the position that the railroads of [1164] the country have overcharged the government on various classes of military traffic, and has filed their claim with the Interstate Commerce Commission and are asking for reparations under the Interstate Commerce Act.

Q. And that is wholly different from those refunds and cut-backs you have been speaking of?

A. Entirely.

Q. And according to your information, what is the total amount the government is asking for from the railroads generally in this proceeding?

Mr. Phleger: No, if your Honor please, I object to it upon the ground it is incompetent, irrelevant and immaterial and speculative.

The Court: I can't see what the materiality is,

(Testimony of Charles Elsey.)

what the government is asking the railroads generally.

Mr. Adams: We then proceed and take our percentage of it, your Honor. We just have to start with a figure. Mr. Phleger stated on page 914 of the transcript, I believe the page number is—I am not sure about the page number, though, but I think that is it.

Mr. Phleger: Are you sure it is me?

Mr. Adams: Yes, I am sure that the statement was made by counsel during his statement, and he referred to the fact that this amount involved in this proceeding was such and such a figure, and the witness will agree with you if you will just let [1165] him answer. I would like to have the witness answer if he can, the same question.

Mr. Phleger: You mean as a result of my newspaper reading, I am more informed about these matters?

Mr. Adams: You seem to be well informed, and the witness will give me the same answer you stated, I believe.

Mr. Phleger: Well, I have an objection which I made.

The Court: I haven't got it clear what you are talking about.

Mr. Adams: Mr. Phleger referred to the reparations proceeding on a former occasion in this court, and he named a figure at that time which I think is the same figures the witness will state.

(Testimony of Charles Elsey.)

The Court: What the government is generally claiming from the railroads?

Mr. Adams: Yes, the overall figure.

Mr. Phleger: I think that is wholly immaterial.

Mr. Adams: Well, all we can do with that, your Honor, and the simplest thing to do with it——

The Court: Well——

Mr. Adams: ——is to get the figure to start with, and then see where we go with it. It is preliminary, it is simply a foundational question.

Mr. Clark: This being a claim, your Honor, that hasn't even been established. How can that be deducted from any tax or [1166] income for tax purposes?

* * *

The Court: Well, how can the witness calculate what the Western Pacific's share of this might be? I am just curious to know how that might be done.

Mr. Adams: Well, we can ask the witness.

Q. Mr. Elsey, assuming that you had a figure for the overall amount of the reparations claims against all the railroads in the reparations cases, supposing that you have such a figure in your mind but you don't say it, now then, how would you go about figuring out what the Western Pacific's proportion of that might be?

A. Take the Western Pacific's proportion of the revenue to the total revenue of the railroads as a whole.

(Testimony of Charles Elsey.)

The Court: I know, but they might not all have been hauling military materials.

A. Well no, you couldn't say that——

Q. (By Mr. Adams): Well, don't you know as a fact, Mr. Elsey, that the Western Pacific itself hauled at least its proportion of the wartime traffic? [1167]

A. I would say we handled more.

Mr. Adams: So that, in that case, your Honor, we would make that proportion which would be conservative on the basis of that breakup.

The Court: Well, before I could rule on that, I would have to know more about these reparation claims, what they are and what is the status of them.

Mr. Phleger: Isn't it material if they don't think they are meritorious at all and they believe that they are not obligated to pay them, so that you simply have the merest speculation here now?

Mr. Adams: Well, I would like to answer his Honor's question if I may.

Mr. Phleger: There is no specific claim against this defendant at all—nothing pending.

Q. (By Mr. Adams): Is the Western Pacific a party to that proceeding? A. Yes, sir.

Mr. Adams: That is the answer to that one, your Honor.

Mr. Phleger: Well, is there any claim against them, specifically?

Mr. Adams: Now just one minute, counsel; let

(Testimony of Charles Elsey.)

me go ahead with my statement, because what a reparations proceeding is is a statutory proceeding under the Interstate Commerce Commission Act, and under the Interstate Commerce Act all of us are aware [1168] of the fact that you first have a proceeding to determine the propriety, ex post facto, of the right to what is claimed, and that is what is going on in the reparations proceeding at present. Now as against all claimants other than the government, the statute puts a very short statute of limitations upon the presentation of reparations.

The Court: Are you saying that if this thing results eventually in the assessment of additional claims against the railroad by the government, that all the railroads are going to be able to go back and open up all their income taxes in all the years gone by?

Mr. Adams: Well, let me get the first question, your Honor, which is, What is going to happen to the income? Now these are facts about this. I will ask Mr. Elsey about this.

Q. The fact is, is it not, that the reparations case involves in the main, wartime traffic?

A. Yes, sir.

Q. It involves solely wartime traffic handled for the government's account?

A. That is correct.

Mr. Adams: Now under the statute, your Honor, it is only the government that can come in at as

(Testimony of Charles Elsey.)

late a date as this and seek to recapture tariffs paid to the railroads.

The Court: I understand.

Mr. Adams: Yes. But at this late date, this very large [1169] case is hanging over all the railroads. It is known, it is well known. This is the reparations case. And I am not going to ask Mr. Elsey to give me any estimate of the amount that may come out of that. No such estimate can be made. I would just like to prove, as one of the equities before this court, that there is hanging over the head of his railroad a prospective diminution of its wartime income from governmental sources, and that, I think, is the fact. As to getting the amount, the only amount I can give is the amount of the claim, because it is the only thing known at this time.

The Court: Well, would it be any different than a claim that might have arisen during this same period by virtue of some big accident on the railroads, where the amount of the damage claim against the railroad might not be ascertained until several years afterwards?

Mr. Adams: Yes, yes, your Honor. This is a major attack upon the railroads' wartime income, on the very basis of a claim by the government that they made too large profits. So obviously it is a direct attack upon the income.

The Court: Well, suppose some twenty people got killed in a wreck and had a \$2,000,000 claim

(Testimony of Charles Elsey.)

against the railroad company; that would be a direct claim upon the income, wouldn't it?

Mr. Adams: No, it is a direct attack upon the property of the railroad in some way, shape or form. This is an attack upon the income, the very thing the government taxes, and this is an [1170] equity court, and these people are in here asking that there be taken from our clients monies belonging to our clients in any ordinary concept on some theory or other that they are entitled to share in what are called "tax savings," your Honor.

The Court: Well, there is enough in the record to indicate that what your contention is, the nature of those reparations claims, and that it is impossible to estimate them, that they might be a substantial claim against the Western Pacific at some future time.

Mr. Adams: The only thing I want to add to that, so that I might have clearly before your Honor rules, is that the figure that Mr. Phleger mentioned the other day, or as he said, read out of the newspaper, the figure that I want the witness to tell me about, for the overall amount \$3,000,000,000. It is very easy to laugh about something if you are not a railroad executive trying to keep it out of the red, and very easy on the part of these gentlemen (indicating) to indicate that they are seeking money from a wealthy concern, that had twice been through reorganization.

The Court: All right, Mr. Adams, you have re-

(Testimony of Charles Elsey.)

viewed this matter. What is the witness' estimate going to be as to what he thinks, if such a huge sum were recoverable by the government against all of the railroads? What would the amount be as to the Western Pacific?

Q. (By Mr. Adams): What would the Western Pacific's part be [1171] if the government should succeed in collecting that huge sum in reparations? A. Four tenths of one per cent.

Q. And that per cent is, I take it, Mr. Elsey, the Western Pacific's per cent of the revenues of the Class 1 rails? A. Yes, sir.

The Court: What does that amount to? Has somebody figured it out already?

Mr. Adams: \$12,000,000—4 x 3, 12.

The Court: Now you have sufficient in the record to show what the nature of this evidence is and the nature of your claim. Now for the time being, I will hold, so that your record may be clear, that that is too remote and not reasonably connected with the tax claim, and you can again take that up when the case is finally submitted.

Mr. MacKinnon: Are you striking? I don't know what your Honor is "holding." You say you "hold." The record will either show that you strike or that the evidence is in.

The Court: Well, the evidence is in and I am holding it as immaterial.

Mr. MacKinnon: Well, you are still permitting it to stay?

(Testimony of Charles Elsey.)

The Court: Well, it will stay whether or not I strike it out; it will be there physically.

Mr. MacKinnon: Well, I am trying to get the purport of your Honor's ruling. [1172]

Mr. Phleger: In order that we may have a record, I move at this time that it be stricken.

The Court: All right, I will grant the motion to strike, and that is without prejudice to your rights to further present that question on the submission of the case. [1173]

* * *

Mr. Adams: Now may I also ask counsel for a stipulation based on the record, which we have all examined, that the monies used in the payment of the Federal income and excess profits taxes for the year 1942 were monies taken out of the funds of the Western Pacific Railroad Company while in reorganization [1174] directly cleared through the Chase Bank and paid to the Collector, that that applies to all four installments that were paid covering that year's taxes? Those monies never went through the treasury or bank deposits of the plaintiff corporation, and the plaintiff corporation did not pay any part of those sums.

Mr. Clark: I think that is correct, except Mr. Curry did have some part in the payment to the collectors. Is that not correct?

Mr. Adams: That is correct. Mr. Curry in New York handled the bank drafts that were transmitted in payment of those installments of tax.

(Testimony of Charles Elsey.)

Mr. Phleger: We will so stipulate, and we will ask you to stipulate that the monies which made up those funds were out of current earnings of the properties.

Mr. Adams: I will ask Mr. Elsey that. Nobody has asked me that question before, counsel.

Mr. Phleger: Well, the '43 reserve, as shown by the testimony yesterday, came out of '43 earnings, and I would assume that is correct.

Mr. Adams: You mean the reserves set up.

Mr. Phleger: The '43 taxes came out specifically from 1943 income.

Mr. Adams: Let's ask Mr. Elsey. I have never been asked that question. [1175]

CHARLES ELSEY

resumed.

Direct Examination

(Continued)

By Mr. Adams:

Q. Mr. Elsey, do you know whether the funds that were used in the payment of the 1942 taxes were taken from the earnings of the property while it was in the hands of the trustees during the year 1942? A. Yes, sir.

Q. And what is the answer?

A. Yes, sir, they were.

Mr. Adams: Then we have a stipulation covering all the facts we have recited?

Mr. Phleger: Yes, sir.

(Testimony of Charles Elsey.)

Mr. Clark: That is correct.

Q. (By Mr. Adams): Now, Mr. Elsey, I would like to refer to the Sacramento Northern Railway, which is, as the record here shows, and was during the period of reorganization, a subsidiary of the Western Pacific Railroad Company. That is the fact, is it not? A. Yes, sir.

Q. Now, this railroad company, the Western Pacific Railroad Company, as the record shows, owned substantially all of the bonds of the Sacramento Northern Railway, is that right?

A. That is correct.

Q. Now I will ask you to state whether there was any indebtedness other than this bonded debt that was owing from the [1176] Sacramento Northern to the Western Pacific in the year 1943; and when I say "Western Pacific" I mean the Western Pacific Railroad Company.

A. That is correct, there was.

Q. Now, in what manner was this additional indebtedness evidenced in the accounts of the Western Pacific Railroad Company?

A. By notes receivable and advances in open account.

Q. And do you have with you a statement of the total amount of the indebtedness of the Sacramento Northern to the Western Pacific Railroad Company which was represented by the notes and advances on open account as of the end of the year 1943? A. Yes, sir.

(Testimony of Charles Elsey.)

Q. And will you please state those amounts for the notes and for the open account advances and the total.

A. The notes amounted to \$4,524,744.38. Open account advances amounted to \$4,949,356.42, or a total of \$9,474,100.80.

Q. How did this indebtedness arise?

A. Principally to take care of the operating deficits of the Sacramento Northern.

Q. Have you been familiar with the operation of the Sacramento Northern Railway and with the financial results of those operations during the entire period in which that Sacramento Northern has been a Western Pacific Railroad subsidiary?

A. I have.

Q. Will you please state whether, in your opinion, this [1177] Sacramento Northern Railway indebtedness to the Western Pacific Railroad Company—and by that I refer to the indebtedness on the notes and the open accounts—was, in your opinion, collectible, that is, whether it was reasonable to expect in 1943 that it would be paid?

Mr. Phleger: We now object to that question——

Mr. Clark: Upon the ground that it calls for the conclusion of this witness, may it please your Honor, on a legal matter. The evidence is pointed toward the use of that as a bad debt, which is purely a matter of law.

Mr. Adams: The purpose of the inquiry, your Honor, is this: We will follow with the account-

(Testimony of Charles Elsey.)

ing evidence with regard to the availability of a partial bad debt upon this particular indebtedness during the year 1943. This witness is the man best informed in view of all his history, as to the fact with regard to the value of those receivables, and I am asking him.

The Court: Well, you are asking what his opinion is.

Mr. Adams: I am asking him whether it was collectible. Of course, that is a matter of opinion.

The Court: No, you asked him if in his opinion it was collectible.

Mr. Adams: Yes, your Honor, and for the purposes of the tax law, that is precisely that, a defensible opinion which is material to the question of a partial write-down. The Treasury Department looks at the matter concerning which they wish to find out whether or not, in fact, writing down an asset of this sort may be appropriate. So they ask just the question I now asked Mr. Elsey.

The Court: Well, you mean that if there was an issue between the taxpayer and the Internal Revenue Department as to what debt could be charged off as worthless, whether the debt could be charged off as worthless, that the opinion of the taxpayer is considered as to its worthlessness, of sufficient weight as to be considered on the question of the right to deduct a bad debt?

Mr. Adams: No, your Honor, I do not mean

(Testimony of Charles Elsey.)

that the Treasury Department is bound by the opinion of the taxpayer; but I do mean that the Treasury Department inquires of the opinion of the taxpayer, because certainly the Treasury Department is entitled to have that information, and it does so.

The Court: Well, does it do so in cases mostly questioning the debt, though?

Mr. Adams: Well, it is a very natural thing for the Treasury Department to question as large a deduction as the one here in question.

The Court: Well, as I understand the regulations of the Treasury Department, those regulations covering the matter of such deductions, they have to be definitely ascertained to be worthless; they have to be charged off on the books, and all the requirements of the regulations with respect to bad debts have to be complied with.

Mr. Adams: Not in this case, your Honor.

The Court: And that would be irrespective of what the opinion of anyone was as to whether it was worthless.

Mr. Adams: Your Honor, in the first place, has reference to the matter of charge-off of a debt as worthless, as to which there are other regulations such as those to which you have just referred. There are other regulations and rulings that apply to the writing down of an indebtedness. What is called a partial write-off. We are now speaking of such a write-off, and in that case, however, as in the case to which your Honor refers——

(Testimony of Charles Elsey.)

The Court: You mean the matter of depreciation of accounts receivable as to book value?

Mr. Adams: That is correct, your Honor; the regulations are to this effect, substantially: The rules with regard to an indebtedness which is not wholly worthless—the taxpayer is privileged to select the year in which he may take a partial write-down upon an indebtedness, the value of which does not entirely disappear. The Treasury Department insists that he justify the partial write-down that he takes, and the Treasury Department in the nature of things goes to the taxpayer and says, “What is your view of the opinion? What do you know about this?” and if he is not able to give such an opinion, of course, the Treasury Department is not going to allow it. [1180] It won’t be bound by his opinion, but they will require it as important.

The Court: Did the company write off all or any part of the indebtedness of the Sacramento Northern?

Mr. Adams: No.

Mr. Clark: No, sir, it did not.

Mr. Adams: May I answer your Honor’s question? Surely this is another instance of the fact—let me put it this way: Your Honor will bear in mind consolidated returns were filed. Now, a partial write-off of an inter-company indebtedness was not a deduction under consolidated return accounting. That is because the transaction was inter-company, and inter-company transactions are

(Testimony of Charles Elsey.)

eliminated when you file consolidated returns. Now, then, we are attacking this problem on the basis of what would have taken place had separate returns been filed, and so we say, your Honor—and this is one of the equities that we bring to the Court—that had that been the case, this matter would have been investigated, the question I have asked Mr. Elsey would have been asked, and if Mr. Elsey answers it in the affirmative and tells me what would have been in his judgment an appropriate figure for write-down, that would have taken place.

It is all hypothetical, as your Honor stated yesterday, but it is based on the essential hypothesis that in order to determine what tax saving, so-called, this company realized [1181] out of these consolidated returns on the basis of a comparison between that and what it would have paid on a separate return basis, it is proper for us to bring forward evidence showing that a deduction could have been taken on a separate return basis which was not in fact taken on a consolidated return basis.

The Court: I understand you said the railroad company owned bonds of the Sacramento Northern. Did it own the stock, too?

Q. (By Mr. Adams): It owned all the stock, did it not, Mr. Elsey? A. Yes, sir.

The Court: Wasn't it the same kind of inter-company transaction that would justify setting

(Testimony of Charles Elsey.)

that up on the affiliated return as between the Western Pacific Railroad Corporation, the holding corporation, and the Western Pacific Railroad Company?

Mr. Adams: No, your Honor. The stock loss was under the law and the regulations a deduction in a consolidated return. Section 23(g)(4) so provided, whereas it is definitely clear under the regulations and the law that the partial write-down of an inter-company indebtedness was not a deduction in the consolidated return but was merely an inter-company transaction that would be disregarded.

The Court: If it had been a total loss in that year, then wouldn't the railroad company have been entitled, or could it [1182] only have set off the loss of the stock of the Sacramento Northern Railroad Company as against the earnings of the Sacramento Northern Railway in the affiliated return?

Mr. Adams: Your Honor, 23(g)(4) applied only to the worthlessness of stock, and in this case I can ask Mr. Elsey the question immediately——

Q. The amount of stock that the Western Pacific Company held, that is, all the outstanding stock of the Sacramento Northern, was approximately \$1,000,000, was it not?

A. That is correct.

Q. And then the Western Pacific also had this approximately nine and a half million dollars of notes and open account indebtedness?

A. That is correct.

(Testimony of Charles Elsey.)

Q. And it also had on top of that some millions of bonds of the Sacramento Northern?

A. In excess of five million.

The Court: When the Supreme Court declared the stock of the Western Pacific Corporation worthless, didn't that hold, or impliedly wasn't the effect of that that the stock of the railroad company, the Sacramento Northern, was also worthless?

Mr. Adams: No, your Honor. The Sacramento Northern was not in a Section 77 proceeding. It has never been reorganized.

The Court: As a separate concern?

Mr. Adams: As a separate concern, and in the proceeding of [1183] the Western Pacific Railroad Company the question at issue was, What securities should be issued in the reorganization of that company? And it was in the course of that matter and in consideration of all the matters bearing upon that matter that the Western Pacific Railroad Company was reorganized.

The Court: Was Mr. Elsey the operating head of the Sacramento Northern as well as the railroad company, or was that a separate position?

Q. (By Mr. Adams): That was a separate position, was it not, Mr. Elsey?

A. Separate, yes. I had no official position with the Sacramento Northern.

Q. Mr. Mitchell was the president of the Sacramento Northern Company at that time?

A. Yes, sir, Mr. Harry A. Mitchell.

(Testimony of Charles Elsey.)

Q. And Mr. Mitchell was at the same time one of the officers of the Western Pacific Railroad Company? A. Yes, sir.

Q. What was his office in the Western Pacific?

A. Vice president and general manager.

The Court: You in consequence of your position with the Western Pacific and its ownership of the Sacramento Northern were required to keep yourself closely informed of the Sacramento Northern, were you not? A. Very much so. [1184]

Q. (By Mr. Adams): And particularly with regard to the Western Pacific's investment in the Sacramento Northern?

A. Taking care of its entire financial situation.

Q. And the entire Sacramento Northern system was operated as a part of one railroad system?

A. Yes.

The Court: I do not know how much weight is to be attached to this sort of speculative testimony, but I think in view of the foundation that has been laid, the witness should be permitted to answer that question.

Mr. Phleger: May I make these two statements, one of them bearing upon the speculative character of this: In the first place, I do not agree with counsel's statement of what the regulations are. The general regulations governing the write-off of a partial bad debt are very similar to those of a total debt. The debt has to become bad partially

(Testimony of Charles Elsey.)

during the period in which it is taken. The question is not even framed on that basis, but this is already in the record and uncontradicted. This defendant company accrued taxes during the entire year 1943 in the amount of \$7,000,000, closed its books for that year, set up the reserve, reversed the entries; they made no partial tax deduction. They did that at a time that they did not know or had not decided that they would use the plaintiff's stock loss, and so it must be assumed that if they were going to pay \$7,000,000 in taxes, that they would have utilized any [1185] offset that they had. And I will make the second observation, and your Honor pointed toward it, if they were going to file separate returns, or even under consolidated returns, the Sacramento Northern stock, if it was worthless, could have been written off, and I do not see how you can take a partial bad debt of the securities of a company and still have its stock worth anything, and they did not attempt to write off the stock of the company, which they could have done under a consolidated return. Now, we have been charged with afterthoughts many times, but this is the most afterthought I have ever heard of. It is in the pure realm of speculation. The record also shows that in the last eight months of 1944, when they could have filed any kind of return that they wanted to, they filed the returns and paid taxes of four or five million dollars. They did not take this loss then.

Mr. Clark: On a consolidated basis, your Honor.

(Testimony of Charles Elsey.)

Mr. Phleger: They could have filed either on a consolidated or a separate basis.

Mr. Clark: They filed on a consolidated basis with the company as a parent.

Mr. Phleger: But they had an option to file on a consolidated basis. They were entitled to take that loss. They did not do it. They paid millions of dollars of taxes. They paid taxes in 1945 and 1946.

The Court: The trouble with that argument is in allowing [1186] this testimony in, I am only allowing it in in connection with the testimony of your accountant, in which he estimated what the tax would have been had a separate return been filed.

Mr. Phleger: But on the basis of the material known at the time, not years afterwards.

The Court: Maybe the question could be re-framed. I think the witness should be permitted to give his opinion as to the definitely ascertainable loss during the taxable year of the indebtedness owned by the Sacramento Northern to the Western Pacific Railroad Company, and that that answer may be admissible for what it may be worth in connection with the issue raised by the testimony offered by the plaintiff concerning the matter of what the tax would have been had a separate return been filed by the railroad company for the years in question. You asked the question a little differently from that.

(Testimony of Charles Elsey.)

Mr. Adams: Your Honor, what I asked was a preliminary question. If I may draw it to your Honor's attention you will see it was preliminary. My question was preliminary, and was then to lead to a question substantially as your Honor has said, but I think the preliminary questions should perhaps be asked. The preliminary question was, "Please state whether or not in your opinion this Sacramento Northern Railway indebtedness to the Western Pacific, namely, the open accounts and notes, was collectible, that is, whether it was reasonable to expect that in 1943 it would be paid?" That is just preliminary, and I think the witness may perhaps appropriately answer that [1187] question and then come to the question of how much.

The Court: I think the objection to that question is good, Mr. Adams, but I think a question along the lines that I suggested would go to the fact as to whether or not any part of it was definitely, in the opinion of the witness, uncollectible during that time.

Mr. Adams: I do not want to labor this with your Honor because we have a common objective in mind, but it would seem to me it was a question of fact and a fair question to ask the witness: Was the whole amount collectible, and then if he says "No" to that question, then I will ask him the other. Now, if your Honor does not think that that is the right way to do it—it seemed to me it was appropriate.

(Testimony of Charles Elsey.)

The Court: Of course, the provisions of the statute you are talking about haven't got anything to do with whether or not the whole of the debt is collectible or not. It is whether or not it is definitely determinable during the taxable year that the debt or any part thereof is worthless and uncollectible.

Mr. Levy: Would your Honor like to hear that section?

Mr. Adams: If I might proceed.

The Court: I have had cases under it. I think I am sufficiently familiar with that, and I would allow you to ask the witness questions along that line. That is the only thing that is material under that section, in my opinion, whether or not [1188] this witness from his experience and knowledge and contact with the situation is able to state whether any part of this debt was definitely determined to be worthless and could have been written off during the taxable year.

Mr. Adams: May I again, to save my record, ask the question and then perhaps I might make an offer of proof?

The Court: Very well.

Q. (By Mr. Adams): Mr. Elsey, referring to the indebtedness of the Sacramento Northern to the Western Pacific Railroad Company on notes and open account during the year 1943, to what extent, if at all, was there a definite ascertainable amount by which that indebtedness in your opinion could be written down as uncollectible?

(Testimony of Charles Elsey.)

Mr. Phleger: I object to that. It is not the question that was suggested. The question as suggested was what portion, if any, of that debt was ascertained to be collectible in the year 1943.

The Court: In the opinion of the witness. I think it covers exactly what you want, and then you save yourself from the objection as to the form of the question.

Mr. Adams: Your Honor, I do not want to press this. We have studied this material. We do not accept adverse counsel's statement of just what the rules are. We believe the rule to be on a partial indebtedness that the question is the extent to which the debt is uncollectible at that time, and I so [1189] phrased my question because that is our theory of our defense, and we believe we are correct about that, and we can satisfy your Honor when the time comes to debate the regulations; and I would like to ask the question in that form with your Honor's permission. Of course, if we are on the wrong ground it would be our failure to meet the proper view of the law.

The Court: Will you answer it.

(Question read.)

Mr. Phleger: I object to that on the ground it calls for the conclusion of the witness on an immaterial matter.

The Court: Overruled.

A. I would say that 90 per cent of it was uncollectible.

(Testimony of Charles Elsey.)

Mr. Phleger: I move that that be stricken out as not responsive.

Q. (By Mr. Adams): In my question, Mr. Elsey——

Mr. Phleger: I would like a ruling.

The Court: Let it go out and reframe that.

Mr. Adams: I would suggest that the answer is perfectly responsive. I asked him an amount and, it is true, he gives me a percentage, but a percentage is an amount. That is the only objection to the question that it is not responsive.

Mr. Phleger: No, it is not.

The Court: Mr. Elsey, in your opinion how much of the indebtedness owing the railroad company by the Sacramento Northern Railroad Company in that year could you, in your [1190] opinion, have written off the books as being a loss because of its uncollectibility?

A. I would say 90 per cent of it.

The Court: Now you may have an objection to my question, too.

Mr. Phleger: No, that is all right.

Q. (By Mr. Adams): Mr. Elsey, in answering his Honor's question you were referring, were you not, to the indebtedness of the Sacramento Northern upon the open account and the notes?

A. Yes, sir.

Q. Mr. Elsey, in connection with your answer to his Honor's question did you bear in mind that certain repayments had been made by the Sacramento Northern to the Western Pacific in 1942,

(Testimony of Charles Elsey.)

1943 and 1944 and 1945? A. Yes, sir.

Q. Do you have with you a notation of the amount of those repayments? A. Yes, sir.

Q. Will you please state them to the Court?

Mr. Phleger: Do I take it, if it please your Honor, that these are payments on what was then the balance of the open account or the notes? I do not understand the word "repayments."

Mr. Adams: Mr. Elsey can answer those questions in due course, but let us get along with this. I am trying to lay the [1191] facts before the Court and before counsel.

The Court: Go ahead.

A. In 1942 the Sacramento Northern paid to the Western Pacific on account of notes and advances \$22,000; 1943, \$103,000; 1944, \$170,000; 1945, \$100,000, a total of \$595,000. [1191-A]

Q. Now during those years did the Sacramento Northern pay to the Western Pacific the interest on its bonded debts? A. No, sir.

Q. And you considered, in giving your answer, the fact that these repayments had been made during those years? A. Yes, sir.

Mr. Adams: Now in another aspect of our defense, your Honor, I have asked Mr. Elsey to bring some information to Court which he has, with regard to the conversion of income bonds of the reorganized railroad company. Part of the financial structure of the reorganized company, after it was reorganized, was income bonds convertible into common stock. The sole purpose that I have in making

(Testimony of Charles Elsey.)

this offer is as a part of our defenses of estoppel and laches, to show the change of position which occurred between the time of the transactions themselves and the time that the lawsuit was brought. And I make that explanation so that counsel may know the purpose of this offer.

Q. Now, Mr. Elsey, what was the total amount of income bonds actually issued under the plan of reorganization by the reorganized company?

A. \$21,219,000.

Q. These bonds had a conversion privilege, did they not? A. They did.

Q. What was the nature of the privilege?

A. 20 shares of common stock for each thousand dollars face [1192] amount of 4½% income bonds.

Q. To what extent have any of these bonds been converted into common stock from the time of issuance until July, 1946? You have that figure?

Mr. Clark: Well, I object to that question.

A. No.

Mr. Clark: Upon the ground it is incompetent, irrelevant and immaterial. Apparently, your Honor, the conversion was on the part of bondholders or creditors of the defendant company who chose to become stockholders. There was no showing as to their reasons for so choosing. I fail to see how that can possibly constitute a change of position on the part of the defendant company which is necessary to the establishment of the defense of laches.

(Testimony of Charles Elsey.)

Mr. Phleger: Well, not only that, until he shows, or rather I think the record already shows, that one of the interests, the largest one, converted theirs—the James interests, who knew all about this controversy, and furthermore, how could any estoppel arise when the records and the annual reports show that these matters had been reserved? Isn't that a question of law in this case?

The Court: Well, that seems to me, though, a question of the legal effect of the facts. You may be entirely right in your argument. I am not prepared to rule on that. But the fact itself cannot, or probably is not, subject to dispute. It is mainly as to how much of the bonds would be converted. Now as to what the effect of that is, as a legal question, we could probably reserve ruling on that, couldn't we?

Mr. Phleger: Well, it is also a factual question, too, isn't it, as to what the motives would be?

The Court: I assume there wouldn't be any controversy as to how much the bonds were, how many were converted.

Mr. Phleger: No.

Mr. Clark: We have no quarrel with that.

The Court: As to that extent, it would be harmless, anyhow, even if it goes in evidence.

Mr. Clark: We have no quarrel with that; it is simply the effects of it that is material.

The Court: I will overrule the objection.

Q. (By Mr. Adams): Mr. Elsey, do you have that figure to the middle of 1946?

(Testimony of Charles Elsey.)

A. The end of 1946?

Q. No, the middle of 1946.

The Court: You are referring to the date the suit was filed in New York?

Mr. Adams: That is the beginning of the New York action, yes.

Q. My recollection is, Mr. Elsey, that we don't have that figure. A. I think I have.

Q. You do? That's splendid; then we can have it now. [1194]

A. The amount of the bonds converted to the end of 1946 was \$4,489,300.

Q. Now do you have it to the middle of 1946?

A. No, I have not.

Mr. Adams: May we at a later date, your Honor, supply that figure without recalling the witness, and counsel may have an opportunity to check it?

The Court: Yes.

Mr. Adams: I have no further questions, your Honor.

Cross-Examination

By Mr. Phleger:

Q. Have any of those convertible bonds been converted since 1946?

A. Yes, there is \$3,000 converted, face value, converted in April, '47.

Q. That is the last?

A. That is the last.

Q. Now how much of the bonds that were con-

(Testimony of Charles Elsey.)

verted of the \$4,489,000 that you have just told us about, belong to the James interests?

A. \$3,707,800.

Q. The James interests are represented by Mr. Coulson, are they not?

A. What is that?

Mr. Adams: Your Honor, may I make an objection to the question? That is my sole purpose. It is wholly immaterial who [1195] made the conversion as long as the conversion was made prior to the notice of the existence of this claim.

The Court: Well, of course that is the same—I can rule on that the same as I ruled on the other objection. The fact itself is there, and you cannot use a legal conclusion from that.

Mr. Phleger: Well, I even meet the challenge of counsel because I show that almost all of these bonds belonged to the very man that conceived the method of saving taxes. So that there couldn't have been any misleading of him.

Mr. Adams: Well, there certainly could be a misleading of anyone in the non-assertion of a claim, your Honor; that is a point of my position.

Mr. Phleger: Well, you will stipulate that Mr. Coulson represents the James interests, won't you?

Mr. Adams: Mr. Coulson will be here and testify, and of course it is the fact and has been an advertised and patent fact since prior to the institution of this reorganization in 1935.

The Court: All right, on the same ground I will

(Testimony of Charles Elsey.)

overrule the objection as I did of plaintiff's counsel. I will overrule the objection.

Q. (By Mr. Phleger): Now, Mr. Elsey, how much of the \$9,474,100.80 owed by the Sacramento Northern to the Western Pacific Railway was collectible on December 31, 1942?

Mr. Adams: May I object to the question, your Honor, and [1196] state my reason? The law with regard to partial write-offs is definitely to the effect that even though a partial write-off would have been justified in prior years, the taxpayer does not have to take it. He can take the partial write-off. This is as distinct from the total write-off. He can take a partial write-off of an indebtedness even though in prior years such a partial write-off would have been appropriate. Now upon that ground I object to the question.

The Court: I will overrule the objection.

A. In December of '42 we paid, the Sacramento Northern paid the Western Pacific, \$222,000.

The Court: No, he wants to know how much of that 90% that you spoke about could have been written off as uncollectible on December 31, 1942. Is that right?

A. I would say the same amount.

Q. (By Mr. Phleger): Now what were the best operating years of the Sacramento Northern in the last ten years? A. During the war period.

Q. What years?

A. I would say '43 to '45.

(Testimony of Charles Elsey.)

Q. It had operating profits in each of those years, did it not? A. No, I don't think so.

Q. What years did it have profits in?

A. I couldn't tell you offhand.

Q. It had a profit in 1943, didn't it? [1197]

A. I think it did, yes.

Q. Now the Sacramento Northern is an integral part of the Western Pacific system, is it not?

A. Yes, sir.

Q. And its continued ownership was provided for in the reorganization plan, was it not?

A. No.

Mr. Adams: Well, the plan speaks for itself.

Mr. Phleger: Well, I have read it.

Q. As a matter of fact, the plan provides that the earnings of the Sacramento Northern shall be consolidated with those of the Western Pacific Railway, and in order to determine certain earnings for the purpose of paying on income bonds——

Mr. MacKinnon: That is objected to on the ground the plan speaks for itself.

A. Yes.

Mr. Phleger: Well, the witness has already answered it "yes."

Mr. MacKinnon: It doesn't make any difference, the objection is made.

The Court: I see no harm in that question; if that is a correct statement, counsel. Overruled.

Q. (By Mr. Phleger): The answer is "yes"?

A. Yes.

(Testimony of Charles Elsey.)

Q. The Western Pacific at all times controlled the Sacramento [1198] Northern?

A. Yes, sir.

Q. And it determined itself, did it not, the time and amounts of these payments that you referred to?

A. Yes, sir.

Q. When you wanted a payment, you told them to pay you?

A. Absolutely.

Q. What was the purpose of these advances that were made over the years?

A. Both for the operating deficits and for capital expenditures.

Q. To keep the road running?

A. Yes, sir.

Q. When you made those advances, did you do so with the expectation of collecting them?

A. That all depended on what the future held out as far as traffic was concerned.

Q. Well, you advanced them to keep it running?

A. That is right.

Q. Not with the idea of collecting them again, except as subsequent events might turn out?

A. That is correct. [1199]

* * *

Q. Will you explain to the court just what a cutback and a refund is? You said you paid them. Does that mean you paid out monies in cash?

A. You would on a refund, but on a cutback it has already been deducted by the government.

Q. In other words, it is a book transaction?

A. They just charge your account. That is it.

(Testimony of Charles Elsey.)

Q. So that when you said you had paid it, it is subject to that qualification?

A. That is correct.

Q. How much of these were cutbacks and how much were refunds?

A. I couldn't tell you. The vast majority of them were cutbacks.

Q. The vast majority were cutbacks. Now when you paid these charges in 1942, '43 and '44, you thought the charges were proper charges against the government, didn't you?

A. That is correct.

Q. And when they cut back on you or required a refund, did you change your mind?

A. That was dependable on what the circumstances brought out, [1200] and also the decisions of the United States Supreme Court.

Q. Well, none of these matters have been litigated, have they? A. Yes, sir.

Q. How much of the payments that you have made on cutbacks were pursuant to court order or adjudication? A. I couldn't say.

Q. You haven't any idea?

A. Not at all. It has been quite a number of cases rendered by the Supreme Court on various commodities, but it would take a vast amount of accounting work to go through that.

Q. So far as you know, that has never been done? A. No, sir, not that I know of.

Q. So that that figure isn't available?

A. No, sir.

(Testimony of Charles Elsey.)

Q. Now have you abandoned, or did you abandon, in behalf of the railroad all hope of collecting these amounts that had been charged against you by cutbacks? A. No, sir.

Q. You still think they are due you?

A. No, no, not all of them, of course; the proposition is this: at the beginning of the war, for security reasons, the government did not comply with all of the tariff provisions. That is particularly true on export traffic. And under export tariffs, in order to secure the export rate, which is always lower than the domestic rate, the shipment would have to move out on a [1201] commercial vessel. It was later decided, after a conference between the military people and the railroads as a whole, that we would grant them not only the export rate, but also the land grant deduction on all shipments, whether it moved on government vessels or whether it moved on commercial vessels. And these cutbacks make up a large portion of that class of traffic. And in order to secure that—not only the export rate but the land grant deduction—the government had got to support with what we call an “export certificate,” showing that the shipment did actually move out of a Pacific Coast harbor.

Q. Well, now, I understood you to testify that no compilation has been made as yet as to how much of these cutbacks are ultimately justified and how many you still dispute? A. No.

Q. Now with respect to the payments, the cut-

(Testimony of Charles Elsey.)

backs that you thought were justified, how did you treat them income tax-wise?

A. I couldn't tell you.

Q. You didn't direct that they be deducted from the taxes paid during the years in which they were actually paid out?

A. That is a matter that would be handled between our accounting department and our tax counsel.

Q. And you have no knowledge?

A. No, sir, I have none.

Q. Mr. Elsey, was the Sacramento Northern debts collectible in full as of December 31, 1941?

A. No, sir.

Q. How much of it was uncollectible then?

A. I couldn't tell you.

Q. More than 90%?

A. The percentage, as far as any particular date was concerned, would be—the controlling factor there in that matter would be as to how long the war was to last.

Q. Well, now, I am asking you to estimate how much of that Sacramento Northern debt was collectible on the last day of 1941.

A. I couldn't tell you.

Q. You have no judgment on that, although you have on '42 and '43?

A. Yes, because the war was in effect, and as far as the end of '41 was concerned, why, we were only in the war for a little more than a month, and

(Testimony of Charles Elsey.)

we had no idea at all as to what amount of war traffic the Sacramento Northern was handling.

Q. Well, then, your judgment would be that more, a greater part of it, would be uncollectible at the end of '41 than at the end of '42 or '43, isn't that so? A. I would say so, yes.

Q. It was less collectible, then? A. Yes.

Q. As a matter of fact, it was more collectible in 1943 than for any year in the ten previous years, wasn't it? A. I would say so, yes. [1203]

Mr. Phleger: That is all.

Cross-Examination

(Interveners)

By Mr. Clark:

Q. Mr. Elsey, prior to the time you testified before Judge St. Sure on March 3 of 1944, in support of the tax reserve, had there been inquiries made of the company by any persons respecting the reversal of the 1943 tax accruals?

A. You mean people outside of our organization?

Q. Yes, sir. A. Not that I recall.

Q. In order to refresh your recollection on that subject, let me show you a telegram marked "Railroad Defendant's Exhibit 910" on deposition, addressed to you as president of the company, by Shelley Pierce, financial editor, Journal of Commerce, on January 28, 1944, and after examining that, Mr. Elsey, I will ask you whether or not

(Testimony of Charles Elsey.)

during January of '44 the company was in receipt of inquiries from the press and members of the public concerning the reason for the reversal of the tax accruals which had been accrued during '43 on a consolidated basis. (Handing to witness.)

Mr. MacKinnon: I object to it on the ground it is irrelevant and immaterial to any issue in the action. [1204]

* * *

Mr. Clark: May I have the question read back?

The Court: Well, I think the witness heard it, Mr. Clark. Did you hear the question?

The Witness: Yes.

Q. (By Mr. Clark): Well, Mr. Elsey, is your recollection now [1205] refreshed that the company did receive such inquiries?

A. That is correct, they did receive them after we issued our reports for December of '43 for the year '43. That was given out to the press on either January 25 or January 26, as I recall it.

Q. I see. And is the telegram I have shown you one of those inquiries? A. Yes, sir.

Q. By the way, do you remember approximately when it was that the books of the company were closed for the year 1943?

A. I would say about the 18th of January, somewhere in that vicinity.

Q. Now, Mr. Elsey, let me show you a photostatic copy of the telegram addressed to Shelley Pierce, financial editor, Journal of Commerce, New York, dated January 28, 1944, and signed "Charles

(Testimony of Charles Elsey.)

Elsey'' which has been marked Interveners' Exhibit 325 on deposition (handing to witness). I will ask you whether you recollect sending that telegram.

A. Well, there is no question but what that telegram was sent by my office.

Q. All right. Now, directing your attention, Mr. Elsey, to the portion of the text of this telegram within the words "quote" and "unquote," will you state whether or not that was a prepared statement which had been decided upon so far as answering any such inquiries was concerned?

Mr. MacKinnon: May I have a continuing objection to all this testimony on the ground it is irrelevant and immaterial?

The Court: I don't *what* what this is about.

Mr. MacKinnon: This is the same subject matter that you ruled on before.

The Court: Well, all that the witness has testified to, so far as that is concerned, is that his recollection was refreshed, and they did receive inquiries as to why there was this reversal of the item. That is all the testimony there is. I don't see why that required any further elucidation, unless this is a new subject matter. I don't know whether it is or not.

Mr. Clark: Well, may it please your Honor, on direct examination Mr. Adams asked Mr. Elsey, and the purpose is obvious, whether or not——

The Court: You don't have to argue the matter,

(Testimony of Charles Elsey.)

because I don't know what it is you are trying to bring out.

Mr. Clark: Very well, will you please answer the question?

A. No, it was not a cut and dried proposition.

Q. (By Mr. Clark): It was not a prepared statement? A. No, sir.

Q. And I refer to the language in the telegram between the words "quote" and "unquote"?

A. That is correct.

Mr. Clark: May it please your Honor, we will offer this telegram, or rather the copy of it, in evidence as Interveners' [1207] Exhibit next in order.

Mr. MacKinnon: I object to it on the ground it is irrelevant and immaterial to any issue in the action.

The Court: Let me see it. I cannot rule on this without knowing what it is.

(Document handed to court through clerk.)

Mr. Clark: Your Honor will observe there is no mention of the stock loss, and this series of correspondence bears directly upon the defense of laches, and particularly Mr. Adams' eliciting of this witness that all inquiries were answered with full and complete data, and particularly his reason for going into the testimony concerning stock loss before Judge St. Sure, and your Honor will find particularly with respect to the Sacramento Northern set off, as bearing upon laches, that this period is particularly critical. Now I propose to

(Testimony of Charles Elsey.)

show, may it please your Honor, that during this time, the only statement given by the company to the public which would have been the answer to any inquiry the stockholders may have made, would have been that which is included in that telegram, which assigns the reason for the tax saving to be a reduction in capitalization of the company; namely, the defendant, instead of the stock loss. It bears directly on laches, and it is directly responsive to Mr. Adams' direct examination. I also propose to show who approved that language, and the employees were instructed to give no other information, and that was suggested to Mr. Schumacher in New [1208] York, that he make no further comments than the quoted language.

The Court: What was the point of all that?

Mr. Clark: Simply to show that during this period of time, may it please your Honor, so far as inquiries addressed to the company were concerned, they were not making public this very thing which is before your Honor, namely, the use of the holding corporation's stock loss, which bears upon their present defense of laches. They claim we should have asserted some claim at this time, and with respect to the Sacramento Northern situation, it is certainly pertinent, because there is a date in this period upon which that turns. The proof consists of two other documents and about three questions, your Honor.

The Court: What is the basis of the objection, so I can get it clear?

(Testimony of Charles Elsey.)

Mr. MacKinnon: It is completely irrelevant and immaterial to any issue in the action. The accrual of the tax reserve was an accrual made in the normal and natural way, application made to to the reorganization court, Judge St. Sure passed upon it, the reserve was passed on, and with respect to the specific document that you have before you, if we are going into this, we have got a newspaper article by Shelley Pierce, which we will offer, where he comments on this very stock loss. I say these things are completely irrelevant and immaterial to the issue before you.

Mr. Clark: All later in time, your Honor. All publicity on this matter, your Honor, was subsequent to the hearing on the [1209] tax reserves.

The Court: So was this, wasn't it?

Mr. Clark: Oh, no, the hearing on the tax reserve was March 3; this was January. The purpose of this is to establish that up until the testimony before Judge St. Sure on the tax [1209A] reserve, there was a deliberate effort on the part of the company to keep quiet the use of the stock loss, which bears upon any defense of laches, and this establishes it.

Mr. Adams: I do not rise to make an objection, but to indicate that, of course, Mr. Clark's statement of his own arguments is, I take it, a statement of argument and that is all. If I were to follow him closely, I might have some differences with him about his own statement of facts.

The Court: You have asserted the defense of laches?

(Testimony of Charles Elsey.)

Mr. Adams: I have.

The Court: You did go into that somewhat with this witness, although not in particular detail, and, of course, this might be—I am unable to evaluate it at the moment, but it may have some relevancy to the question of laches which I am unable to determine at the moment.

Mr. Clark: May it please the Court, the direct question was asked by Mr. Adams on his direct examination unrelated to any event at all whether any information requested by any party to the reorganization proceeding was given as promptly and as fully as possible.

Mr. MacKinnon: What page, please?

Mr. Clark: I do not know the page. I took it down as it was given. I checked it this morning; it is in the transcript. Would you like me to get it?

Mr. MacKinnon: Yes, I would like to see it. I certainly [1210] remember no such testimony.

Mr. Clark: I certainly remember it and made a note of it. Page 1092, your Honor, line 6:

“Q. During this trusteeship, what was your practice with respect to furnishing information when it was requested by parties to the reorganization proceeding?”

“A. We always furnished any information that was requested just as promptly and just as fully as we possibly could to them.”

Mr. MacKinnon: Your Honor——

Mr. Clark: Just a minute, please. Now, Mr.

(Testimony of Charles Elsey.)

Matthew made a point of introducing, may it please your Honor, the intervention of the holding corporation in the reorganization proceeding for the purpose of protecting itself under the plan. The argument will be made that the plaintiff corporation was a party to the proceeding and should have come in and asserted its claim, and so forth, and I propose to show to your Honor, that during this particular time, upon the approval of Mr. Coulson, the only information which was being given out by the company did not mention any use of the plaintiff corporation's stock loss, so that any person who was not an officer of both the company and the corporation, that is, any disinterested person or the interveners, if you will, could not have gotten this information. That is the point of it.

The Court: They could have gotten it in the reorganization [1211] proceeding, couldn't they?

Mr. Clark: They could not up to that time.

The Court: Not up to that time but they could at that time.

Mr. Clark: Not at that time, your Honor. This is January, 1944.

The Court: They could have at the time the petition was filed.

Mr. Clark: The petition said nothing about the use of a stock loss, your Honor. You mean the petition for a reserve?

The Court: Yes.

Mr. Clark: It says nothing about the use of

(Testimony of Charles Elsey.)

this stock loss. It simply talks generally about federal taxes, and I have something to show your Honor on that, too.

Mr. MacKinnon: Let me make one response on this. This is the reference that counsel says has to do with the general inquiry by Mr. Adams. Mr. Adams asked him this question:

“Q. During this trusteeship what was your practice with respect to furnishing information when it was requested by the parties to the reorganization proceeding?”

Shelley Pierce was not a party to the reorganization proceedings and never purported to be a party to the reorganization proceeding, and the response made by Mr. Elsey to the question asked, and the question asked was designed to elicit information with respect to parties, namely, whether or not information was furnished the plaintiff when they requested it—— [1212]

Mr. Clark: We will follow this up with a general showing.

Mr. MacKinnon: Permit me to continue, will you, please? What they are attempting to do here is to distort the picture. This reserve and the accruals were handled under Judge St. Sure. Now they pick up an isolated document and they say, “This is what was said.” I can show to your Honor a newspaper article by Shelley Pierce wherein he made specific reference to this stock loss. That is the field we are going into if this field is opened up.

(Testimony of Charles Elsey.)

I do not see its relevancy or materiality to the issue to be determined in this action, and I do not see how it in any wise bears upon any laches.

Mr. Clark: There must be something to it or counsel would not resist so strenuously.

The Court: Oh, I do not know about that. Lawyers usually resist anything the other fellow offers.

Mr. MacKinnon: It is just one more of these asides.

The Court: I cannot see what the president of the company said in a telegram to some newspaper man and what he published has any particular bearing upon the legal rights of the parties or these defenses.

Mr. Clark: Perhaps, your Honor, it will be of some aid if you examine the other two exhibits which I intend to offer in this connection.

The Court: One is a telegram to Mr. Schumacher from Mr. Elsey——

Mr. Clark: One is Interveners' 246 and the other is [1213] Interveners' 324, in which the identical language appears.

The Court: Well, I do not see the bearing on this matter as to what kind of releases were given the press or the public on this matter. What has that got to do with the legal issue?

Mr. Clark: It certainly has to do, your Honor, with the defense of laches which is being urged here.

(Testimony of Charles Elsey.)

The Court: I do not see how it has any bearing on that. Do you mean to say that somebody gets some right because some newspaper publishes something? Some information is given the newspapers?

Mr. Clark: If it please the Court, the defense of laches rests on knowledge or the facts which should have put people upon notice. Laches has been urged against these interveners.

The Court: I have my own suspicions as to why these statements were given to the press. Maybe they are justified or not. It probably has something to do with the activities of the Stock Exchange. But what has that to do with the rights that are involved here?

Mr. Clark: May it please the Court, suppose I offer them for identification. I have made my offer of proof. The record shows the purpose of them.

The Court: Let the three documents be marked for identification.

Mr. Clark: Being first a telegram from Elsey to Shelley Pierce, dated January 28, 1944, marked on deposition Interveners' [1214] Exhibit 325, as Interveners' Exhibit next in order.

The Clerk: Shall I mark these as one exhibit?

Mr. Clark: Yes, 18A, B and C. Next, a telegram from Charles Elsey to T. M. Schumacher, dated January 28, 1944, Interveners' Exhibit 246 on deposition; and nextly, a memorandum dated January 25, 1944, signed Charles Elsey in typing, being Interveners' Exhibit 324 on deposition.

(Testimony of Charles Elsey.)

(The documents referred to were thereupon marked Interveners' Exhibits 18A, B and C, respectively, for identification.)

Mr. Clark: May I have Plaintiff's Exhibit 53, please?

The Court: I think before you proceed we might take a brief recess.

Mr. Clark: Very well, your Honor.

(Recess.)

Q. (By Mr. Clark): Now, Mr. Elsey, with respect to the January 11, 1944, opinion, which is Plaintiff's Exhibit 54 in this case, was there an arrangement that that opinion would not be effective until cleared by Mr. Coulson from New York?

Mr. Adams: The witness is entitled to see the paper if he wishes it in that connection.

Q. (By Mr. Clark): You have in mind the opinion I am talking about, have you not, Mr. Elsey? A. You mean Mr. Polk's opinion?

Q. The opinion dated January 11, 1944, which you requested. A. Oh, yes, yes. [1215]

Q. Concerning these tax matters?

A. Yes, sir.

Q. You have that in mind? A. Yes, sir.

Q. My question was whether or not there was an arrangement that that opinion, although left with you by Mr. Polk, would not be effective until released by Mr. Coulson from New York?

A. No, not Mr. Coulson. Mr. Polk stated that

(Testimony of Charles Elsey.)

he wanted that matter gone over with his associates.

Q. Let me show you in that connection a photostatic copy of a telegram from you to Mr. Coulson dated January 15, 1944, Interveners' Exhibit 346 on deposition, and see if that refreshes your recollection about that matter.

A. That is correct.

Mr. Clark: We will offer this telegram in evidence, your Honor, as Interveners' Exhibit next in order.

Mr. MacKinnon: That is objected to as irrelevant and immaterial. If he wants to put in the full record, it comes out to the same question we had a minute ago. The record shows that Mr. Polk was out in California at the time the opinion was requested, that he wrote a telegram to New York requesting a checking of figures that he was releasing in connection with the opinion. There is a telegram. They have seen it. They take an isolated telegram, they say, "We want to offer this." I think, your Honor, I do not care whether all this goes in; if [1215-A] you want the complete record here, that is o.k. But let us understand that we are putting in the complete record rather than these isolated telegrams on which they are going to ask you to draw inferences and make implications. I say the telegram is completely irrelevant and immaterial to the issue before your Honor.

The Court: Counsel, all that is before the Court is this: The witness stated in answer to a question

(Testimony of Charles Elsey.)

of counsel that he had a certain view concerning the release of this opinion.

Mr. MacKinnon: That is right.

The Court: Then counsel showed him some telegram, which I have not seen yet and do not know anything about, and asked him if that refreshed his recollection about it. The witness said it did. Now, I do not know what is in the telegram.

Mr. MacKinnon: And now he offers it.

The Court: I do not know whether it is of any importance. Why don't you ask him the question, his recollection having been refreshed by whatever you have shown him, what does he now state?

Q. (By Mr. Clark): Your recollection now having been refreshed, Mr. Elsey, will you please tell us whether there was such an arrangement as I call your attention to? A. Yes.

Q. Can you tell us approximately when it was that Colonel Coulson released the opinion by notification to you? A. I couldn't say.

Q. Again let me show you the telegram to which I just called your attention. A. Yes.

Q. What was the approximate date? [1217]

A. The date of this telegram was January 15.

Q. Was that the date upon which the opinion was released? A. I could not say.

Q. Was it after this date of January 15, 1944?

A. Yes.

Q. Very well. In that regard, just so the record may be clear about it, let me show you another

(Testimony of Charles Elsey.)

telegram, Interveners' 71 on deposition, and see if you can tell us the date upon which you received the release of the opinion from Mr. Coulson.

A. Yes, but I did not receive the revised opinion until after the date of January 15.

Q. Am I correct in stating that as of approximately January 15, 1944, Mr. Coulson did release the opinion? A. Yes.

Q. Very well. Now, was it after that, Mr. Elsey, that the books for the year 1943 of the railroad company were closed? A. Yes, sir.

Q. I hand you a memorandum dated January 8, 1944, which has been received as Plaintiff's Exhibit 53 in this case, and I will ask you to examine it commencing with the last paragraph on the first page.

Mr. Adams: Of course, the witness is privileged to examine the whole memorandum, Mr. Clark.

Mr. Clark: No doubt about it, your Honor.

The Witness: What is under this? [1218]

Mr. Clark: Suppose I read it, your Honor? It is in evidence anyway.

The Court: What question are you going to put? Let us have a question.

Mr. Clark: I am going to ask him about a reserve fund that is mentioned in this memorandum, and I would like to call your Honor's attention, as well as the witness', to the portion of the memorandum on which I am going to examine him. Apparently there is a label over some of the language on the exhibit.

(Testimony of Charles Elsey.)

Mr. MacKinnon: Will you state whose memorandum that is?

Mr. Clark: Mr. Polk's memorandum of January 8, 1944, in which he refers to conferences had with Mr. Elsey, Mr. Engelbright, Mr. DeGraff, Mr. Glaster, et cetera.

Mr. Adams: Did you speak of that as a conference, Mr. Clark?

Mr. Clark: Conferences, I said.

"There has been accrued on the operating company's books through November a reserve for Federal tax liability of approximately \$7,500,000. Since there will be no tax liability if this operating loss deduction on a consolidated return basis is allowed, the suggestion was made that the books of account be adjusted so as to reflect at December 31 no accrual for Federal tax liability on the part of [1219] the operating company for 1943. After considerable discussion it was decided tentatively to set up a reserve for road improvement in an amount approximating the \$7,500,000 figure. This action is to be taken upon order of the court after appropriate application for same."

Q. Mr. Elsey, at any conference which you attended on January 8, 1944, or at any time during January respecting these tax matters, did you ever hear any suggestion that a reserve for road improvement be set up in the amount of \$7,500,000?

Mr. MacKinnon: I object to it on the ground it is irrelevant and immaterial to any issue in the action.

(Testimony of Charles Elsey.)

Mr. Clark: It bears directly upon the setting up of this reserve.

Mr. MacKinnon: It has no bearing upon it whatever. It is completely extraneous to the issue.

The Court: What is the importance of this, Mr. Clark, in the cross-examination of this witness?

Mr. Clark: I propose to show, if it please your Honor, that he has testified as to the setting up of the reserve and the reason for it, and on the same subject that I offered the releases to the public, which offer your Honor refused, namely, bearing in mind the effort at this time to keep attention from this tax matter on the part of those who were handling it, I propose to show—and the memorandum so states in effect—that there [1220] was discussed the labeling of this reserve, not as one for Federal taxes, but as a reserve for road improvement. And I also propose to show that there was even submitted to Mr. Elsey a petition to be filed in the court which labeled this reserve fund a reserve for taxes, and some language along the line of road improvement, post-war modernization, and so forth, and I further propose to show that when that petition was submitted to Mr. Elsey he refused to sign it because, in his testimony given on deposition, he refused to appear in support of anything that was not correct before Judge St. Sure.

Mr. Adams: Now, counsel, if you are going to attempt to state testimony, I suggest that the whole of the testimony be stated. Certainly if Mr. Elsey

(Testimony of Charles Elsey.)

is to be asked about this, that characterization of his testimony is not to stand alone and he should be asked.

Mr. Clark: The testimony on the deposition, your Honor, was this, in line with the offer that I am making——

Mr. Adams: I ask you to read the whole of it, on that subject.

Mr. Clark: I will read this part of it on page 280 commencing at line 2:

“When this letter and its attachments came from Mr. Matthew, did you discuss them with Mr. Engelbright”——

Mr. Adams: You haven't got the letter and the attachments before his Honor. [1221]

Mr. Clark: I have them right here. I will hand them up to your Honor.

Mr. Adams: Your Honor, it seems to me that this is an attempt to argue a matter that has not yet been offered before your Honor.

Mr. Clark: I thought I was asked to read the testimony, your Honor.

Mr. Adams: Not at all. I said if you are going to make a statement about the testimony, the whole testimony should be read, and I take it you are not going to do that. The question before your Honor, I take it, relates to a memorandum prepared by Mr. Polk from which counsel was asking questions of the witness. I suggest that if we are going to go forward with the production of evidence in this

(Testimony of Charles Elsey.)

case, that it be done in the regular way and not by an attempt of counsel in advance to state or read portions of testimony taken upon deposition.

Mr. MacKinnon: I object to it, your Honor, on the ground it is irrelevant and immaterial to any issue in the action. This is just a little bit more of interveners' implications and inferences. If they want to lay the full record before your Honor, let them lay the full record there, but it has nothing to do with the record before you.

Mr. Clark: They are not implications or inferences. They are facts demonstrated by documents and are, in Mr. MacKinnon's words, the current record of what the parties did at the time. Our point is it bears absolutely upon the claim made by these people that up to this time this matter was given the utmost publicity, and therefore, they argue, ergo the interveners or someone should have come in on behalf of this plaintiff corporation and, in one instance, file a claim in bankruptcy, and in the other, start some kind of action or what not. It bears directly upon these technical defenses. I have made my offer of proof, your Honor, and I will take a ruling on it.

The Court: I like to allow anything that is reasonably relevant to the matter, but I do not quite see the point of this.

Mr. Clark: Here is a memorandum, your Honor, made by Mr. Polk concerning these tax transactions, in which he refers to a discussion about setting up a tax reserve in the amount of \$7,500,000.

(Testimony of Charles Elsey.)

The Court: There was a tax reserve that was set up, wasn't there?

Mr. Clark: Yes; then he says that is discussed about labeling the \$7,500,000 reserve as a reserve for road improvement, not taxes. Now, what is the purpose of that except to keep publicity from the fact that these tax savings are due to this stock loss? There can be no other reason for it. Why should they discuss, if it please the Court, some label such as reserve for road improvement for what ultimately became a tax reserve fund? I propose to show that this witness, although the memorandum by Mr. Polk says that conferences were [1223] had with Mr. Elsey and others, this witness was never present at any conference where there was any such discussion, and when a petition was presented to him labeled "Post-War Modernization" or what not, he refused to go for it.

The Court: Mr. Clark, I understand that, but the fact of the matter is there was a tax reserve set up. They did file returns on this basis. They did take the stock loss. Now, what do the motives with respect to publicity and that sort of thing have to do with this?

Mr. Clark: This bears on a period prior to the setting up of reserves.

The Court: I have my own suspicions as to the nature of these releases and the reason perhaps for not saying too much on the subject, but just covering whatever was necessary. It seems to me,

(Testimony of Charles Elsey.)

at any rate, that that has no particular bearing upon the dispute. What they talked about with respect to labeling this entry does not seem to me to have any bearing upon it. They did take this stock loss as a deduction. They did set up a reserve for taxes in the event they were unsuccessful in establishing it. What has this business about what they said to the public got to do with it? I do not think it has bearing either on the plaintiff's case or on the matter of any special defense either.

Mr. Clark: Very well, your Honor. I will offer for identification—— [1224]

The Court: I would not hold that anyone was bound by what the newspapers put in or what any of these people said about the newspapers.

Mr. Clark: I will offer for identification, your Honor, the documents I passed up to you as Interveners' next exhibit for identification, being a letter addressed to Mr. Elsey under date of February 8, 1944, signed Allen P. Matthew, as Interveners' Exhibit 445-A, -B on deposition, the title being "Reserve Fund for Contingent Tax Liability and for Post-War Modernization and Improvement," and also the form of petition attached thereto and described as Interveners' Exhibit 445-C to -G upon deposition and entitled "Petition for Authority to Establish a Reserve Fund for Contingent Tax Liability and for Post-War Modernization and Improvement."

(The documents referred to were marked Interveners' Exhibit 19 for Identification.)

(Testimony of Charles Elsey.)

Mr. Clark: And in connection with that also I will offer, may it please your Honor, the following testimony by this witness and take a ruling on it. At page 280, line 2, of Mr. Elsey's deposition. I am making an offer of proof.

Mr. Adams: I understand, your Honor, but the witness is here. I believe he should first put the question to the witness and get your Honor's ruling on it.

Mr. Clark: I am making an offer of proof because I understand his Honor is going to sustain an objection to this [1225] line of testimony. That is my reason for marking them for identification. I am perfectly willing to take a ruling on it without further argument.

Mr. Adams: Why is it necessary to read that into the record?

Mr. Clark: I will answer as to my offer to prove, this: Were Mr. Elsey asked why he rejected the petition which has just been marked for identification, he would testify that he knew nothing about the post-war modernization program, and the petition was not satisfactory to him, and that he was not going before Judge St. Sure on any kind of petition except just exactly what it was supposed to be.

Mr. Adams: Of course, your Honor will understand under your Honor's ruling the witness is now on the stand and is not in a position to testify in regard to that matter because of your Honor's rul-

(Testimony of Charles Elsey.)

ing; that Mr. Clark is now reading into evidence testimony, and he read it fairly——

Mr. Clark: I am making an offer of proof and intend to take a ruling on it, which I suspect will be adverse.

The Court: I will overrule the offer of proof, that is, hold that it is not material on the ground that this subject matter is material neither to the plaintiff's nor the interveners' case nor the defense of laches.

Mr. Clark: Yes, your Honor.

Q. Mr. Elsey, referring to these cut-backs you testified to [1226] on your direct examination as having amounted, I think, to date to some two million dollars—is that right?

A. That is correct.

Q. Does that figure include any cut-backs or refunds arising from export shipments?

A. Oh, yes, yes.

Q. Can you tell us approximately what proportion of your approximation of \$2,000,000 as having already been deducted by the Government or paid arises from the cut-backs or refunds on export shipments? A. No.

Mr. Phleger: May I point out that the witness has already testified that no calculation or computation was made with respect to this particular matter. He stated that he did not do it.

Mr. Adams: I do not understand counsel's statement. It is rather broad and not very clear to me.

(Testimony of Charles Elsey.)

The Court: The witness has answered the question. He said "No."

Mr. Clark: He can't do it.

Q. Mr. Elsey, I will show you an original letter addressed to Mr. James K. Polk, care of Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York, dated October 20, 1944, on the letterhead of the Western Pacific Railroad Company and signed by Mr. DeGraff, General Auditor, being Exhibit No. 82 on [1227] deposition, and I will direct your attention particularly to the paragraph commencing at the bottom of page 2, starting, "There is another situation between the railroads and the Government" over to the next page.

Now we will offer this letter in evidence, your Honor. It treats of these cut-backs at the current time.

The Court: For what purpose is it offered?

Mr. Clark: I want to offer it before I examine him on it.

Mr. MacKinnon: I object on the ground it is incompetent, irrelevant and immaterial.

Mr. Clark: I don't need it in evidence.

Q. Let me ask you this, Mr. Elsey: Now, as to any cut-backs or refunds arising from export shipments, am I correct in stating that for the period up to April 1, 1944, the amount of \$500,000 in those claims had been determined and settled by refunding \$150,000?

A. What is it you want me——

Q. Is that a correct statement?

(Testimony of Charles Elsey.)

A. I don't know. That isn't my letter.

Q. Well, it is the letter of Mr. DeGraff, the general auditor of the company, is it not?

A. Ask Mr. DeGraff; don't ask me.

Q. Well, do you know anything about the subject at all?

A. Not in detail, no. That is an accounting department [1228] matter.

Q. You testified on your direct examination to having known that Mr. Curry was retained by Whitman, Ransom, Coulson & Goetz to do certain work in connection with these tax matters?

A. Yes.

Q. Do you also know, Mr. Elsey, that Mr. Curry's retainer was terminated sometime during the fall of 1948? A. That is correct.

Mr. Adams: Well, the record shows just what the facts are, does it not, Mr. Clark?

Mr. Clark: Well, I haven't the date in mind right now. It was sometime during the fall of '48, and it was to continue until the end of '48.

Mr. Adams: That is right.

Q. (By Mr. Clark): Did Mr. Coulson consult you before terminating Mr. Curry's retainer?

A. No, sir.

Mr. Clark: That is all, your Honor.

Mr. Adams: Your Honor, I have just one or two questions. We could finish, I think.

(Testimony of Charles Elsey.)

Redirect Examination

By Mr. Adams:

Q. Now, Mr. Elsey, in regard to the cut-backs and refunds, Mr. Phleger in one of his questions to you on that subject referred to the matter being involved in book entries, and with counsel's permission I will ask a leading [1229] question at this point: Is it the fact that the way a cut-back operates is that the Comptroller General deducts out of a bill payable to the railroad company the amount of a refund claim that he has previously sent to the railroad company and which refund claim has not been paid by the railroad company?

A. That is correct.

Q. So that there is in that way a reduction in the amount received by the railroad company finally on the transaction to which the cut-back refers?

A. Yes.

Q. Now——

The Court: That is a continuing accounting and bookkeeping procedure, I take it?

Q. (By Mr. Adams): Is that right, Mr. Elsey?

A. That is correct.

Q. Now, you were asked also upon cross-examination whether or not the amount of cut-backs and refunds on war traffic was still in dispute between the company and the office of the Comptroller General? A. That is correct.

Q. Now, in answering that question did you have reference to the approximate \$2,000,000 of

(Testimony of Charles Elsey.)

cut-backs that you know about definitely, as well as to figures in addition to that?

Mr. Phleger: Well, I object to that as a leading question.

Mr. Adams: It is leading. [1230]

Mr. Phleger: And improper redirect examination.

Mr. Adams: The question was raised as to the amounts in dispute, and I want to find out whether the \$2,000,000 figure includes disputed amounts or whether the disputes relate to the additional claims outside of the \$2,000,000 figure. I don't think that I have led the witness to any answer, and I am interested in finding out.

Mr. Phleger: Well, he has testified that he hasn't made any computations and that none had been, no segregation made.

Mr. Adams: It may be the witness will answer my question in the negative. I don't know the answer. I would like to ask the question.

The Court: See if you cannot ask it in such a form that it isn't leading, Mr. Adams.

Q. (By Mr. Adams): You were asked, Mr. Elsey, upon your cross-examination questions in respect of disputes still going on between the railroad company and the Government?

A. Yes.

Q. Regarding these cut-backs and refunds?

A. Yes.

Q. Now, can you tell me whether or not such

(Testimony of Charles Elsey.)

disputes are going on as to that portion of the cut-backs and refunds which have been definitely ascertained by the railroad company?

A. The cut-backs that I mentioned in the approximate figure of \$2,000,000 are cut-backs that we have agreed to. The [1231] Government has also made cut-backs in addition to this \$2,000,000 that we don't go along with; and those matters are still under correspondence.

Mr. Adams: I have no further questions, your Honor.

Recross-Examination

By Mr. Phleger:

Q. What were the years? You have referred to \$2,000,000. What years were those cut-backs for?

A. In what year the shipment was handled?

Q. Yes. A. I haven't got the least idea.

Mr. Phleger: That is all.

Mr. Clark: Ask him to segregate it.

Mr. Phleger: No, I don't want him to segregate it. That is all. [1232]

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